Office-Supreme Court, U.S.
FILED
APR 6 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1194

MYLES F. HEFFERNAN,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS.

F. LEE BAILEY,
40 Court Street,
Boston, Massachusetts.

ADDISON C. GETCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Citations to opinions below	1
Jurisdiction	1
Questions presented	2
Constitutional provisions and statutes involved	2
Statement of the case	3
Statement of facts	3
The trial	4
Post-trial proceedings	10
Reasons for granting the writ	13
I. Introductory note	13
II. The conduct of Major Murgia, the prosecuting police officer, violated due process of law by suppressing evidence	14
III. The petitioner was entitled to an evidentiary hearing on his motion for new trial as a matter of due process of law	20
Conclusion	22
Appendix A	23
Appendix B	61

Table of Authorities Cited.

Cases.

Alcorta v. Texas, 355 U.S. 28	16
Barbee v. Warden, Maryland Penitentiary, 331 F. 2d 842	16
Commonwealth v. Heffernan, 213 N.E. 2d 399	1
Commonwealth v. Millen, 290 Mass. 406	20

Fahy v. Connecticut, 375 U.S. 85 18
Mooney v. Holohan, 294 U.S. 103 15
Napue v. Illinois, 360 U.S. 264 16, 17
Pyle v. Kansas, 317 U.S. 213 16
Rogers v. Richmond, 365 U.S. 534 18
Townsend v. Sain, 372 U.S. 293 21

STATUTES, ETC.

Constitution of the United States, Fourteenth Amendment 2

28 U.S.C. § 1254 (3) 1

G.L. c. 90, § 2 9
G.L. c. 268A, § 2 2

Supreme Court of the United States.

OCTOBER TERM, 1965.

No.

MYLES F. HEFFERNAN,
Petitioner,
v.
COMMONWEALTH OF MASSACHUSETTS,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPERIOR COURT OF MASSACHUSETTS.

Myles F. Heffernan, petitioner, prays that a writ of certiorari issue to review the judgment of the Superior Court of Massachusetts, entered in the above-entitled case on January 4, 1966.

Citations to Opinions Below.

The opinion of the Supreme Judicial Court of Massachusetts is reported at 213 N.E. 2d 399, and is reproduced in our Appendix, *infra.*

Jurisdiction.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254 (3).

Questions Presented.

1. Did suppression by a prosecuting official of information that an important government witness had substantially changed his story violate petitioner's right to due process under the Fourteenth Amendment of the United States Constitution?

2. Did the refusal of the trial judge to hold a hearing when confronted with newly discovered evidence supporting a motion for new trial violate petitioner's right to due process under the Fourteenth Amendment to the United States Constitution?

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STATES.

AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL LAWS OF MASSACHUSETTS, CHAPTER 268A, SECTION 2.

(*b*) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, so-

licits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility * * * shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than three years * * * [As inserted by St. 1962, c. 779, § 1.]

Statement of the Case.

On January 4, 1965, the petitioner was put to trial in the Superior Court for the County of Middlesex before Bolster, J., sitting without jury, on an indictment charging he had asked for and received something of value in exchange for performing an official act. On January 5, 1965, Judge Bolster found the petitioner guilty and imposed a fine of $100. Appeal was claimed on January 6, 1965 and on January 7 a motion for new trial was filed. Said motion was amended and supplemented on February 9, 1965, and was denied without hearing on March 4, 1965. The appeal of the conviction and the denial of the motion for new trial were argued before the Supreme Judicial Court on October 4, 1965, and decided January 4, 1966.

Statement of Facts.

The facts surrounding the alleged bribe upon which the indictment was predicated derived from two sources: the testimony of the petitioner, on the one hand, and of U.S. Army Private Travis K. Stone on the other. A third witness, Private Thomas M. Price, was present at the time of the original encounter between Stone and the defend-

ant, but left the scene prior to the time that any bribe is said to have been solicited or given. Price and others gave testimony bearing on the circumstances surrounding the encounter and Stone's subsequent report that he had bribed his way out of an arrest, but no witness offered any direct evidence corroborative of complainant Stone's contention that he had paid a sum in the neighborhood of $10 (the amount varied from one statement to another) to the petitioner.

We review below the evidence at trial insofar as it is relevant to the issues presented to this Court; thereafter we review the facts arising from the extensive post-trial proceedings wherein the petitioner attempted to place before the trial Court evidence that Stone had perjured himself, and that relevant evidence had been suppressed.

The Trial.

It is undisputed that at some time on the morning of November 1, 1964, Private Travis K. Stone of Fort Devens, Massachusetts, was operating a 1953 blue Ford coupé in an easterly direction along Route 2 in Concord, Massachusetts; that this vehicle displayed a registration plate, but no current inspection sticker; and that the absence of such sticker was observed by Trooper Myles F. Heffernan of the Massachusetts State Police, who was patrolling the area in a cruiser. It is also undisputed that after some conversation Heffernan released Stone without arrest and ordered Stone's car towed away. The reasons for this release, and the manner in which it occurred, are the fulcrum of the case.

Travis Stone, an eighteen-year-old Army Private from Longview, Washington, was at the time stationed at Fort Devens (Tr. 3). He testified that on November 1, 1964,

he and Private Thomas Price left Fort Devens at about 7:30 a.m. and went to a filling station in Ayer, Massachusetts, in order to pick up the Ford coupé he had purchased the day before (Tr. 4). The vehicle was not registered; on the previous night Stone had obtained a registration plate from two negroes (never further identified), who stole it from a parking lot across the street from the filling station.

Stone tied this plate on the car, and, after some difficulty in starting the engine, proceeded with Price to purchase some gas and check the anti-freeze (Tr. 6). Thereafter the pair went to Route 2 and headed toward Boston. Near a cutoff on that road which led to West Acton, at about 10:30 a.m., Stone was stopped by the petitioner. By direction Stone pulled to the side of the road (a divided highway) and stopped (Tr. 8). The cruiser operated by Trooper Heffernan stopped 6 feet behind.

According to Stone (Tr. 9) both he and the petitioner stepped out of their respective vehicles and *met halfway between* them. This was also the version given by the petitioner (Tr. 189). Private Price, however, testified that Heffernan came up to the '53 Ford on the driver's side while Stone was still *behind the wheel* and was then and there told, in the presence of Price, that Stone had no driver's license or registration (Tr. 110).

In any case, Stone testified that after he told the petitioner that he was without license or registration, Heffernan ordered him to get into the cruiser, which he did (Tr. 10). Heffernan told him that he was in the wrong, operating without driver's license, registration, insurance and inspection sticker. After some minutes of conversation, Price came up to the passenger side of the cruiser, stuck his head in the window, and asked if he could drive Stone's car (Tr. 11). The petitioner replied in the negative, and told Price that he could leave (Tr. 12). Price complied,

and Stone last saw him walking west on Route 2, presumably trying to hitch a ride back to Fort Devens.

Stone said that he and the petitioner then got out of the cruiser and removed the stolen registration plate from Stone's vehicle. It was placed, Stone claimed, *in the front seat of the cruiser* (Tr. 13). Thereafter they drove east toward Concord. Heffernan inquired of Stone whether Stone had sufficient money for bail, and Stone said no. Thereafter the petitioner inquired as to whether Price might have some money with which to help Stone out. Stone replied: "I don't know if he does—I don't know if he's got it to spare." The petitioner, having driven 2 or 3 miles toward the Concord Barracks, turned the cruiser westbound and drove for 4 or 5 miles, presumably looking for Price (Tr. 14). Price was not to be found. The two had conversation during the westbound trip, and also during the subsequent eastbound trip to the Concord Barracks, but Stone was *unable to recall* what was said (Tr. 15).

The petitioner halted the cruiser at the Concord Rotary, which is 200 to 250 yards from the Concord State Police Barracks, whereupon, according to Stone, the following conversation took place (Tr. 16):

> "Q. Would you please give his Honor that exact conversation?
>
> "A. He said, 'What do you think of police officers who sometimes take money or let guys off.' I said, 'I don't know,' but he interrupted me and he said, 'But what do you think?' I said, 'I don't know but I could use a break.' He said to me, 'If you would give me enough money to buy me two fifths of Canadian Club Whiskey, I will let you go.'
>
> "Q. What did you say?

"A. I said 'Okay.' He pulled over to the side of the road by the rotary in Concord. I pulled out my billfold. I showed him I had a five dollar bill and five ones. I said, 'Could I keep a dollar?' He said, 'Yes.' I gave him nine dollars.

"Q. In what form of currency did you give him the nine dollars?

"A. A five and four ones.

"Q. And what did he do with the money that you handed to him?

"A. He had it in his hand when I last saw him.

"Q. What happened next after you handed the money to him?

"A. I got out of the vehicle. This was at the rotary in Concord."

Then, according to Stone, the petitioner drove off toward Concord. Stone thumbed a ride in what he recalled as a 1947 Ford four-door sedan (Tr. 45) and went westbound on Route 2 to the point where his car was parked. He then got into his car and drove directly back to Ayer, arriving there at the gas station he had left that morning *at 1:30 p.m.* (Tr. 42).

Stone did not report the alleged bribe to any officials, civil or military, on November 1st, or either of the two subsequent days (Tr. 46). On the night of Tuesday, November 3d, however, he was apprehended on the Airport Road in Ayer by a Sergeant of the Ayer Police while driving the same Ford without any registration plate (Tr. 47). On the following day he appeared at the Ayer Police Station and had conversation with Chief Picard. He at that time admitted driving unregistered and uninsured, and also admitted the theft of a tire and wheel two days before (Tr. 48, 51).

During this conversation, Stone mentioned to the Chief that, when picked up for the same offense on a prior occasion, he had bribed the police officer apprehending him (Tr. 52). When questioned as to his reason for making disclosure to the Chief, Stone explained: "I just thought I would let him know about it" (Tr. 53) and because he wanted to do his duty as a citizen (Tr. 59).

Stone thereafter was interrogated by Sergeant Edward Byron of the Massachusetts State Police, petitioner's superior officer at the Concord Barracks. He told Sergeant Byron that *he had showed Heffernan a bill of sale* for the Ford (Tr. 132), a fact which he categorically denied at trial (Tr. 11, 29). Stone also told Byron that the conversation leading up to the bribe was as follows:

> "He asked me how much it would be worth to get off. I said I didn't know. He said that it would take a couple of bottles of Canadian Club. I asked him how much that was, and he said eleven dollars. I told him I only had nine dollars and *he said I could owe him a couple.*" (Tr. 133.) (Emphasis supplied.)

Stone in his testimony was wholly unable to recall this alleged extension of credit by the defendant (Tr. 68, 69).

Trooper Myles F. Heffernan testified that he had been an officer in the Massachusetts State Police for something over thirteen years. He related that on November 1, 1964, he did stop Travis Stone eastbound on Route 2 as alleged, and that they did meet halfway between the cruiser and Stone's car for a brief conversation at about 8:25 a.m. (Tr. 187-189). Other evidence showed that Heffernan turned in his cruiser at 9 a.m. (Tr. 126).

According to the petitioner, he instructed Stone to produce a license and registration. Stone exhibited a Texas driver's license, which had expired in September, 1964,

and thus would have been valid because of Stone's military status (Tr. 190). Stone had no registration, but stated that he had a bill of sale for his present vehicle. Stone went to his car to get the bill of sale, and Heffernan went to the cruiser (Tr. 192). Stone got into the cruiser and exhibited a bill of sale. Heffernan testified in detail to a description of this bill of sale (Tr. 192)—detail which Stone had corroborated with his own testimony (Tr. 26) in response to *leading* questions. (The bill of sale was never produced at trial.)

Because the bill of sale was dated less than two Registry working days prior to the time of apprehension (Tr. 193), and because Stone claimed to have transferred the plates to the Ford from another car which he owned and had abandoned at Fort Devens, the petitioner had some doubt as to the validity of the transfer because Stone had not *traded* his previous auto, but had *abandoned* it (Tr. 195) (*cf.* G.L. c. 90, § 2).

Price came to the window of the cruiser on Stone's side, and asked whether or not Stone could operate on Price's valid California driver's license. The petitioner replied in the negative, and Price left on foot (Tr. 194).

The petitioner then told Stone that it would be illegal for him to register the car in Rhode Island, as Stone said he intended to do, because Rhode Island was neither his home state nor the state in which he was stationed. Heffernan advsied Stone that he was going to have the car towed in pending proper registration (Tr. 196) and radioed the Concord Barracks at 8:30 a.m. (Tr. 121) that he wished an "abandoned" car towed off Route 2. Heffernan explained that he used the term "abandoned" because he had had Stone remove the registration plate from the bumper and place it in the trunk (Tr. 197), and thus knew that the driver of the wrecker would find what appeared to

be an abandoned car with no means of identification other than color and make. Heffernan further stated that at the time he saw Stone put the plate in the trunk he noticed that the trunk contained a jack but *no spare tire or wheel* (Tr. 197).

The petitioner then told Stone that the penalty for an improper registration could be two to three hundred dollars, and that Stone should be more cognizant of Massachusetts laws before operating motor vehicles on its highways (Tr. 198). Stone lamented the possibility of such forfeitures, explaining that he only made $75 per month and would lose his chance for a promotion to Private First Class if he were to be involved in legal trouble. Heffernan then wrote on a slip of paper the name and address of the garage where Stone's car could be found, and allowed Stone to depart. He last saw Stone on the westbound side of Route 2 as Stone was catching a ride in a white pickup truck (Tr. 199). Heffernan asserted that at no time while Stone was in the cruiser had he moved it from the spot where it had originally stopped behind Stone's car.

Private Price testified that just before he caught a ride back to Fort Devens *he saw the cruiser moving* (Tr. 111) and *did not see Stone* (Tr. 118), who was presumably in it.

Post-Trial Proceedings.

On January 5, 1965, the petitioner was found guilty by the Court. The following day investigation was commenced into the circumstances surrounding the unexpected testimony of Private Price (App. 26), and as a result thereof a motion for new trial (App. 23) and supporting Offer of Proof (App. 24) were filed. Thereafter, at an in-

formal hearing on the motion for new trial, the Court requested that affidavits be filed (Tr. 23). Such affidavits were subsequently filed (App. 31), and these disclosed the following:

A licensed private detective named Daniel Bloomfield, Jr., had been employed by defense counsel to inquire into and report on the case in the pretrial stages (App. 37). In the course of such investigation Mr. Bloomfield interviewed the witness Price, on December 18, 1964, who stated unequivocally that he *had not* seen the petitioner's cruiser leave its parked position on the date of Stone's apprehension (App. 37). Mr. Bloomfield did not report this statement to defense counsel at any time before the conclusion of the trial, simply because there was thought to be no question in this regard (App. 38). Mr. Bloomfield was not present when Price gave testimony inconsistent with his statement of December 18th (App. 38).

As a result of a conference held immediately after conviction with defense counsel, Mr. Bloomfield went to Fort Devens for further investigation. He interviewed Sergeant Wayne Kruntorad and Chief Warrant Officer Jeffrey Wallace of the Provost Marshal's Office, and also Witness Price. As a result of such interviews he learned that on November 13, 1964, Price had been interviewed by Captain Robert D. Murgia and Lieutenant Hector Cote of the Massachusetts State Police, in the presence of Sergeant Kruntorad. Price at that time stated to the officers that *he had not* seen petitioner's cruiser move prior to the time that he, Price, had gotten a ride back to Fort Devens (App. 32).

Price stated that the testimony he had given at trial was inaccurate, inasmuch as he was *not* certain about the cruiser having moved, and that he had given such testimony only at the insistence of Stone in the presence of the prosecutor (App. 39).

As a result of the Court's request that affidavits be submitted, Mr. Bloomfield returned to Fort Devens on January 12, 1965, and obtained the affidavits of Sergeant Kruntorad and Chief Warrant Officer Wallace (R. 14). On the following day he obtained the affidavit of Private Price, who had at this time had reverted to his trial testimony because he felt that he was being insulted by newspaper reports which alleged that he, Price, had not told the complete truth at trial (App. 39).

Defense counsel attempted to get the affidavit of Major Robert Murgia (Captain Murgia was promoted between the date of his investigation and the date of trial) as to whether he had known about Price's inconsistent testimony as he sat in the courtroom and heard Price testify (R. 17), but Major Murgia refused to give any affidavit at all (App. 36). Because a *hearing* on the motion for new trial was denied (App. 50), the record is silent as to what explanation, if any, Major Murgia might have given for failing to bring to the attention of at least the prosecutor Price's seriously inconsistent pre-trial statement.

Thereafter, on February 8, 1965, as a result of information given to defense counsel, Mr. Bloomfield went again to Fort Devens and obtained affidavits from six additional witnesses who had heard Travis Stone chortling on the day petitioner was convicted. These are set forth in the appendix hereto (App. 41).

The substance of these affidavits discloses that the very day Heffernan was convicted and sentenced Stone said the following:

> "I hung him by the b - - ls!"
>
> "I screwed him and I'd do it again."
>
> ". . . I was caught by this other cop, I might as well take [Heffernan] with me . . ."

"Heffernan didn't know enough s - - t. Me and Price got a good story, and we're gonna stick by it."

Then, a few days later, when Sergeant Minos Paris mentioned to Stone that he had heard that defense counsel had found a flaw in Price's story, Stone said: "Oh, I'm not worried about that. I'm going up to talk to Price now" (R. 28).

At a hearing upon the original motion for new trial (Tr. 22) the trial judge remarked that ". . . should it ever be discovered that Stone were not telling the truth, a grave injustice would result. In such event I would do everything I could to right the wrong."

However, when faced with Stone's post-trial declarations as set forth above, as well as the fact that the witnesses signatory to the affidavits were about to be transferred without the Commonwealth (Tr. 4), the trial judge refused to hold a hearing (App. 50).

The petitioner filed, with his motion and supplemental motion for new trial, certain requests for rulings of law (App. 28). The Court accepted these and ruled upon them as indicated (App. 49).

Reasons for Granting the Writ.

I. Introductory Note.

The case presented in this petition appears on its face to be of too little moment to warrant prevailing upon the labors of this Court, for it involves a charge of a $9 bribe punished by a $100 fine. Of course, the petitioner has been, by virtue of this conviction, removed from his office of thir-

teen years and forever barred (under Massachusetts law) from ever again holding a position of trust in this Commonwealth; but, despite the fact that the habeas courts are closed to him because of the token sentence he received, petitioner does not seek certiorari simply because it is the last and only means by which his conviction may be set aside.

We feel that the two questions presented below are of vital concern to courts and litigants on the criminal side, and that some clarification of what minimum standards must be met in these situations—neither of which is infrequent in criminal practice—would greatly benefit state criminal jurisprudence and perhaps reduce the need for federal habeas judges to seek facts which state judges have refused to confront.

II. The Conduct of Major Murgia, the Prosecuting Police Officer, Violated Due Process of Law by Suppressing Evidence.

As was indicated in our statement of facts, the one piece of evidence which corroborated the young soldier who accused petitioner, and flatly contradicted petitioner's testimony, was that adduced from Private Price. He testified that he had seen the cruiser move; Heffernan swore that it had not.

Seated in the courtroom during this testimony was Major Robert D. Murgia of the State Police. When Price testified to the cruiser having moved with complainant Stone still in it, Major Murgia knew, because Price had told him during the pre-indictment investigation of the case, that Price's original statement on the matter was quite to the contrary. The Major did not bring this fact to the atten-

tion of the defense, the trial Court, or the prosecuting attorney (App. 35).

Major Murgia's role in the case was of no small significance. He had assigned a subordinate, Lieutenant Cote, to investigate the matter; but when Lieutenant Cote submitted a report concluding that Heffernan had not taken a bribe, Murgia rejected the recommendation and in turn urged prosecution (Tr. 155-156). On direct examination, in a non-responsive answer, Murgia made plain the fact that he personally disliked Heffernan (Tr. 150).

It was not until after Heffernan's conviction that defense counsel learned that Price had made an earlier statement consistent with petitioner's innocence, and that he had made such a statement to Major Murgia (App. 38). The Court below held that no error was committed, for several reasons; it did this without benefit of any testimony from the Major on the point, for the trial judge to whom the motion for new trial encompassing this issue was addressed refused to hold a hearing, and the Major refused to make any statement or submit an affidavit without the compulsion of a subpoena (App. 36).

First, said the Supreme Judicial Court, it would not apply the rule of *Mooney* v. *Holohan,* 294 U.S. 103, because there was no claim that the suppression was done by the prosecuting attorney. Second, that Court ruled that, because Major Murgia had not *procured* any perjury, but had merely remained silent as he became aware that he had the power to disclose highly impeaching evidence against a government witness, nothing had been suppressed (App. 73). Third, the Court below ruled that, whatever Murgia might have done, the error was cured by the fact that Price's earlier statement was known to a defense investigator who had failed to communicate it to defense counsel (App. 73); and, finally, the Massachusetts Court relied upon a remark

by the trial judge during post-trial proceedings that he would have convicted Heffernan even without Price's testimony (App. 73).

This multi-barreled disposition of the question misses, we think, the underlying jurisprudential rule relating to suppression of evidence by the state.

This Court has repeatedly held that suppression of relevant evidence by prosecuting officials violates due process of law. *Pyle* v. *Kansas,* 317 U.S. 213. *Alcorta* v. *Texas,* 355 U.S. 28. The fact that the evidence withheld goes only to the credibility of a witness does not alter the rule. *Napue* v. *Illinois,* 360 U.S. 264, 269.

The fact that the wrong here complained of was not that of the attorney trying the case for the state, but of a high-ranking prosecuting police officer, does not justify the distinction which the Court below has attempted to draw in avoiding the suppression principle.

> "The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure."
>
> *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842, 846.

If it is to be held that, although prosecutors must observe some standard of fairness in disclosing evidence favorable to the defense, police are free nonetheless to conceal as they please, the teeth are yanked from the rule. For the police are the ones who have initial contact with, and control over, the evidence. Often, as in this instance, a prosecutor will be unaware of what has been covered, and thus blameless in the suppression, unless it is clear that his office *must* acquaint him with all the facts and let him decide what may or may not be held back. Unless it

is made unmistakably clear that no exception is to be made for misconduct by police officers, prosecutors are given a panacea by which to avoid confrontation with the agonizing decision as to whether a defendant is entitled to evidence favoring his cause. The rule suggested by Massachusetts cannot help but encourage police officers to exercise their special authority to tamper with the evidence in order to improve their conviction rates.

The statement of the Court below that ". . . it does not appear that Murgia or any other member of the prosecution *solicited* any perjury or suppressed any facts . . ." takes no account of a very clear principle stated in a case which the opinion cites (App. 71):

> "The same result obtains when the State, although not soliciting false evidence, allows it to go uncorrected when it appears."
>
> *Napue* v. *Illinois,* 360 U.S. 264, 269.

Therefore, if it is correct to say that Major Murgia is encompassed within the meaning of the "State," the suppression is fully as complete when he treats false evidence with silence as when he manufactures it out of whole cloth.

The fact that knowledge of Price's earlier inconsistent statement was constructively, though not actually, in defense hands is another matter. Concededly, defense investigator Bloomfield had talked with Price before trial, and had heard from Price that when he last saw Heffernan and Stone they were in the parked cruiser (App. 38). He did not report the matter to counsel, because its significance was not then apparent.

Whether or not this was good judgment on the part of Mr. Bloomfield, or whether Heffernan might have fared better had he enjoyed more alert and capable investigators

and lawyers, is an improper ground with which to dispose of an issue of this ilk. The underlying principle which condemns suppression of relevant evidence by the state is penal in nature, much akin to the penal thrust of the prohibition against illegal searches and seizures. It is intended to persuade officials to play fair with the evidence or forfeit the case; for this reason it is not the fact of perjury by a government witness which violates due process, but the fact that the state procured or condoned that perjury. What Mr. Bloomfield may have known and not reported is not relevant to the question at bar, for Murgia's silence cannot have occurred in reliance upon what he believed Mr. Bloomfield knew, since the two had had no contact. His decision to refrain from mentioning his earlier conversation with Price was independently made, and presumably will recur unless discouraged by this Court.

Finally, we think it no answer to say that, because in review and reflection the trial judge saw fit to comment that Price's evidence was not essential to the conviction, the error can be wiped away. This is tantamount to ruling that the error, if any, was harmless as a matter of fact. If Major Murgia's conduct would have been impermissible in a jury trial, it was fully as wrongful jury-waived. We do not believe that the rule of harmless error can be applied to this unconstitutional conduct any more than it can to cases where confessions are improperly admitted. *Rogers* v. *Richmond,* 365 U.S. 534. And, although this Court did not reach the precise issue, we think the same rule would apply where illegally seized evidence was used. *Fahy* v. *Connecticut,* 375 U.S. 85. The *Fahy* decision is particularly relevant here, we think, because in that case too there was a bench trial and the Connecticut Court had ruled that the wrong had not influenced the result, a view which this Court reversed.

We think it difficult to conceive of circumstances where a trier of fact, having heard evidence making a liar out of the defendant such as was here adduced from Price, could be psychologically capable of wholly disregarding that evidence in weighing the case. This trial was a close one at best, as the Court below conceded (App. 69), where the only two witnesses to the alleged bribe were a young convicted thief and a state police officer with an unblemished record of thirteen years' service and a sound reputation for honesty and integrity (Tr. 157-183). Except for the testimony of Price, it was strictly a question of the credibility of Private Stone *vs.* petitioner. To say in retrospect, and in defense of one's judgment, that there was no "reasonable possibility" that Price's uncontradicted testimony influenced the outcome flies in the face of human psychology.

It also ignores the fact that, had the defense been able to use this earlier contradictory statement by Price, much more could have easily developed. There is good reason to believe that the testimony Price gave was procured or urged by Stone (App. 39); that Stone had a passionate interest in convicting petitioner is demonstrable from the satanic glee he displayed (App. 41) when the finding was announced. Had Price admitted that he had changed his story at Stone's behest, it is incredible that any judge in any jurisdiction would have found Heffernan guilty. Properly armed with the information Major Murgia withheld, this is precisely what the defense might well have adduced.

In summary, we strongly urge that the circumstances of this case as they present the question as to what minimum standards the prosecution must observe, and just who the "prosecution" is for purposes of exercising a license to withhold evidence, warrant granting a writ of certiorari.

III. The Petitioner was Entitled to an Evidentiary Hearing on his Motion for New Trial as a Matter of Due Process of Law.

Set forth in our appendix, and summarized in our statement of facts, are the post-trial developments in this case relating to (1) the discovery of Major Murgia's conduct and (2) the post-trial statements of Stone, the chief prosecuting witness. We believe that, upon the material presented by affidavit, the petitioner was entitled to a hearing where the witnesses could have been forced to take the stand, and to testify.

Private Price, during a post-trial interview, admitted that his trial testimony was false and that he did not in fact remember seeing the cruiser drive away (App. 39). At a second interview Price stated that he was miffed because he had heard that the defense was attacking his credibility, and would thus revert to his trial testimony. Major Murgia refused to say anything at all (App. 36).

Massachusetts allows the trial judge to elect whether he will entertain evidence supporting a motion for new trial orally or by affidavit. *Commonwealth* v. *Millen,* 290 Mass. 406, 410. Although in certain circumstances such a procedure may be adequate, it is hardly a method calculated to search for truth when vital witnesses are hostile and refuse to give affidavits. In this case the material put before the trial judge was such as to require him to "fully and fairly" litigate the questions presented, and to elicit testimony from those whose conduct had been thrown in a suspicious light.

The Court below disposed of the contention that a hearing was necessary by saying of Stone's post-trial statements:

> "These could have been interpreted as expressions of Stone's great satisfaction in having helped convict the defendant as much as expressions showing that Stone had harbored a prior intent to convict him by any means." (App. 71.)

Furthermore, this thought that Stone's statements were mere expressions of satisfaction at having contributed to a just conviction cannot be squared with Stone's remark that he had "screwed" petitioner (App. 42, 44). This word has such common usage and clear meaning as a vulgar colloquialism that it cannot be doubted as expressing the notion in Stone's mind that he had *unjustifiably* caused harm to petitioner. Without cross-examination of Stone in open court, petitioner had no means of demonstrating that this was an admission by Stone that he had lied successfully, or that he had urged Price to perjure himself in order to corroborate Stone's own doubtful story.

We urge the denial of a hearing as a constitutional violation because we believe that, had petitioner been deprived of his liberty by the sentence, he would be entitled to an evidentiary hearing in a federal habeas court on the facts alleged to the trial judge. The situations where such a hearing is mandatory have been carefully detailed by this Court in *Townsend* v. *Sain,* 372 U.S. 293, and we feel that the facts of this case fall within the perimeter of that decision. Ironically, since the allegedly felonious conduct of petitioner was rewarded with a nominal fine, he can apply for an evidentiary hearing only in the state trial Court, and that has been refused.

There are no important or governing policy considerations which militate in favor of approving the denial of such a hearing. Certainly the cross-examination of both Major Murgia and Private Stone, in light of information

available for the first time after trial, would have been most valuable to the petitioner. The evidence relating to each of these men was such that they would have had some difficult questions to answer; and these answers might well have shown that Heffernan was wrongfully convicted.

If in situations such as these state judges were more willing to make full inquiry into a litigant's allegations, the need for ever-burgeoning post-conviction remedies would diminish. We urge that minimum standards of constitutional due process demand that criminal defendants standing in the shoes of this petitioner cannot be confined in their proofs to the wholly inadequate process of securing affidavits from such witnesses as are willing to co-operate, and no statement at all from those who are hostile. We respectfully request that a writ of certiorari issue to review this issue.

Conclusion.

For the reasons stated above, petitioner suggests that a writ of certiorari ought to issue to review the judgment of the Superior Court of Massachusetts.

Respectfully submitted,

F. LEE BAILEY,
40 Court Street, Boston.

Appendix A.

On the seventh day of January, A. D. 1965, the defendant filed "Motion for New Trial", which is as follows:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CRIMINAL I

COMMONWEALTH

VS.

MYLES F. HEFFERNAN

MOTION FOR A NEW TRIAL

Now comes the defendant in the above-entitled case and moves that the finding of guilty be vacated, or, in the alternative, that a new trial be granted, on the following grounds:

(1) There was not sufficient evidence to sustain the charge framed in the indictment presented by the state, the defendant, or both.

(2) The finding of the Court was against the weight of the evidence.

(3) The finding of the Court was predicated upon evidence which would have been seriously impeached were it not for the suppression of certainly highly relevant evidence by one who was a party to the prosecution.

(4) Justice has not been done and cannot be done upon the judgment of conviction now entered against the defendant.

WHEREFORE, the defendant respectfully requests that this Honorable Court:

(a) Hold a hearing and receive evidence therein, to determine whether or not the within allegations are true;

(b) Vacate the finding of guilty, and substitute therefor a finding of "Not Guilty"; or,

(c) Grant a motion for a new trial.

By his attorneys,
F. Lee Bailey
Robert A. Barton

Filed Jan. 7, 1965

On the seventh day of January, A. D., 1965, the defendant filed "Defendant's Offer of Proof in Support of His Motion for New Trial", which is as follows:

Commonwealth of Massachusetts

Middlesex, ss. Superior Court
Criminal I

Commonwealth
vs.
Myles F. Heffernan

Defendant's Offer of Proof in Support of his Motion for New Trial

Now comes the defendant and says that if he were allowed a hearing upon his motion for new trial, he would present the following evidence, as bearing upon the factual issues described below:

I. In the course of defendant's trial, there were numerous disputed issues, to wit: (1) Whether or not Witness Stone showed defendant an expired Texas Driver's License on 11-1-64; (2) Whether or not defendant placed Stone's registration plate in the Cruiser; (3) Whether or not defendant solicited a bribe; (4) Whether or not defendant received a bribe of nine dollars; and (5) Whether or not defendant drove the Cruiser from the place of apprehension with Stone as a passenger. On each of the first four (4) factual issues, the testimony of Stone was not corroborated to any degree and the case against the defendant rested upon Stone's testimony alone. The only testimony not emanating from the complainant, Stone, which tended

to impeach the testimony of the defendant, related to issue (5) and was contained in the testimony of Witness Thomas Price. Price stated unequivocally on direct examination, and maintained on cross-examination, that "just before" he got a ride westbound on Route 2, he observed the cruiser with Stone in it pull away from the side of the road. This testimony corroborated Stone, and flatly contradicted the defendant's insistence that the cruiser never moved until after Stone had left it.

II. On November 13, 1964, Thomas Price was interviewed at the Provost *Marshall's* office, Fort Devens. In charge of the interrogation was Captain Robert A. Murgia, Massachusetts State Police and at the time, defendant's Commanding Officer; also present were the defendant, Lieutenant Hector J. Cote, and Sergeant First Class Wayne Kruntorad, CID, Provost *Marshall's* Detachment. Price was questioned during this interview about the specific matter in issue. He then stated flatly and unequivocally, "I never saw the cruiser move at all." The fact that this statement was made was never disclosed to the prosecutor, defense counsel, or the Court by Robert A. Murgia. Major Murgia was in the courtroom during Price's testimony, and heard Price make a statement directly opposite to that made on November 13, 1964. Major Murgia is an experienced professional police officer and investigator, with substantial familiarity with legal cases and the rules of evidence. He knew that his evidence was admissible, favorable to the defendant, and such as to throw doubt on the case for the government. He had no right to remain silent about it, and yet chose to do so. Major Murgia had a personal interest in the outcome of the case; he was personally biased and prejudiced against the defendant. He did not and does not like the defendant. He admitted during his testimony that he personally had re-

jected the recommendation of his own investigating officer, Lieutenant Cote (see Exhibit #6), and sent the case to the District Attorney of Middlesex County for prosecution. Evidence will show that Major Murgia was elated at the fact of defendant's indictment, and expressed malevolence toward the defendant to others. In view of this personal antagonism between the Major Murgia and the defendant, it will be shown that evidence favorable to the defendant, was willfully suppressed in violation of defendant's federal constitutional rights.

III. On December 18, 1964, Thomas Price was interviewed in the Provost *Marshall's* office at Fort Devens by Daniel Bloomfield, Jr. a licensed professional investigator serving the defendant. Present was Captain Robert A. Welsh of the office of the Staff Judge-Advocate. Mr. Bloomfield asked Price where the cruiser was when Price had last seen it on the day in question. Price stated unequivocally that the cruiser had been stopped at the side of the road, and had not moved at all.

IV. On January 6, 1965, Mr. Bloomfield went to Ft. Devens and interviewed Sergeant Kruntorad, above-named. Thomas Price was called in to explain the discrepancy between his earlier statement of November 13, before Sergeant Kruntorad, and his testimony at trial. Price stated, in the presence of Mr. Bloomfield, Sergeant Kruntorad, and Mr. Jeffrey Wallace, Chief Investigator of the Provost *Marshall's* office, that he was in fact not sure that he had seen the cruiser move. He explained as his reason for testifying otherwise at the trial the following circumstances, which would be borne out on undisputed evidence if a hearing were held:

A. On Monday, January 4, 1965, Price came with Stone to the Middlesex Superior Court. He there met for the first time Donald L. Conn, Esq., who presented

the case for the government. He was interviewed by Mr. Conn in the presence of Stone. He was asked whether he had seen the cruiser move. He said, "I'm not sure." Mr. Conn suggested that he dredge his memory for his best recollection on the point. Stone urged Price to "think" about the matter very hard, and indicated that Price would have to be sure one way or the other. Price then said, "I think it did move." Price later testified unequivocally that the cruiser did move. (It is not contended that this modification was solicited or encouraged by the prosecutor.)

V. There are many instances of specific conduct on the part of the defendant which render inconceivable the notion that he would solicit or accept money in exchange for a professional disservice. It is conceded that such evidence would be inadmissible at trial, and indeed, was not offered. However, it is contended that the power of this Court to act under ground (4) in the motion for new trial is very broad, and that in considering the *liklihood* that justice has not been done and cannot be done upon the conviction, the Court has discretion to relax the strict rules of evidence. Defendant contends that the specific acts of which proof is available would support the conclusion, grounded in human logic and human experience, that defendant is not the type of person who would solicit a petty bribe; that his acceptance of a bribe is extremely unlikely.

This alleged conduct includes repeated refusal of gratuities from citizens in the form of Christmas presents, or in return for rendering personal kindnesses to motorists in distress, or for extraordinarily honest conduct. The evidence would show that defendant turned in to the department on one occasion a very large sum of cash which had been left in a public place inadvertently by its owner. These instances of unusual honesty and integrity tend to

show that defendant is innocent of the charge framed in the indictment, and that his conviction is unjust.

By his attorneys,
F. Lee Bailey
Robert A. Barton

Filed Jan. 7, 1965

On the twenty-sixth day of January, A. D., 1965, the defendant filed "Defendant's Request for Rulings of Law", which is as follows:

Commonwealth of Massachusetts

Middlesex, ss Superior Court

Commonwealth

vs.

Myles Heffernan

Defendant's Request for Rulings of Law

Now comes the defendant in the above-entitled case and moves that this Honorable Court make the following rulings of law with respect to defendant's motion for a new trial:

1. If the evidence of Witness Thomas Price is struck from consideration as not credible, there is remaining in the record insufficient evidence to support the defendant's conviction as a matter of law.

2. If the evidence of Witness Thomas Price is struck from consideration as not credible, the finding of guilty is against the weight of the evidence in the above-entitled case and a new trial is warranted.

3. If a party to the prosecution willfully withheld evidence which, if disclosed, would have seriously impeached the commonwealth's only witness corroborative of the complainant, the finding of guilty is vitiated as a matter of law

even though there might be sufficient other evidence to support it, because such suppression is in violation of the Fourteenth Amendment of the Constitution of the United States.

4. A Major in the Massachusetts State Police, who is party to the investigation of a bribery complaint against an inferior officer, and who is instrumental in causing the case to be submitted to the District Attorney for prosecution, is a party to such prosecution to the extent that he has an absolute duty to disclose to said District Attorney any and all evidence which may be favorable to the defendant.

5. A Major in the Massachusetts State Police, who is party to the investigation of a bribery complaint against an inferior officer, and who is instrumental in causing the case to be submitted to the District Attorney for prosecution, is a party to such prosecution to the extent that he has an absolute duty to disclose to the Court any and all evidence which may be favorable to the defendant.

6. A Major in the Massachusetts State Police, who is party to the investigation of a bribery complaint against an inferior officer, and who is instrumental in causing the case to be submitted to the District Attorney for prosecution, is a party to such prosecution to the extent that he has an absolute duty to disclose to the defendant any and all evidence which may be favorable to the defendant.

7. In the captioned case, in all of the circumstances, Witness Robert Murgia is deemed a "party to the prosecution."

8. In the captioned case, in all of the circumstances, the withholding of evidence tending to favor the defendant by Major Robert Murgia is a denial to the defendant of a fair and impartial trial as guaranteed by the Fourteenth Amendment to the Constitution of the United States.

9. A trial judge, sitting on a motion for new trial, has the power to relax the rules of evidence, within his discretion, and receive evidence tending to show that defendant's conduct historically, and prior to trial, is wholly inconsistent with any tendency to commit the crime charged.

10. A trial judge, sitting on a motion for new trial, has the power to relax the rules of evidence, and, where the defendant is charged with soliciting and receiving a nominal bribe, to receive evidence that the defendant has in the past refused unsolicited gratuities of a similar nature.

11. A trial judge, sitting on a motion for new trial, has the power to relax the rules of evidence and receive evidence of specific acts of honesty, where it can be shown that defendant's alleged acceptance of a bribe is wholly inconsistent with an historical tendency toward honesty and fidelity to his office.

By his attorneys,
F. Lee Bailey
Robert A. Barton

Filed Jan. 26, 1965

On the twenty-sixth day of January, A. D., 1965, the defendant filed "Affidavits to Support Motion for New Trial", which are as follows:

Commonwealth of Massachusetts

Middlesex, ss Superior Court

Commonwealth

vs.

Myles Heffernan

Affidavits to Support Motion for New Trial

Now comes the defendant in the above-entitled case and submits the following affidavits in support of his motion for a new trial:

1. Jeffrey B. Wallace, C.W.O., U.S. Army
2. Wayne C. Kruntorad, SFC, U.S. Army
3. Thomas M. Price, PFC, U.S. Army
4. F. Lee Bailey, Esquire
5. Daniel Bloomfield, Jr.

By his attorneys,
F. Lee Bailey
Robert A. Barton

Affidavit

January 12, 1965

I, Jeffrey B. Wallace, Chief Warrant Officer, United States Army, depose and say under oath that on January sixth, 1965, I was present in the investigations section of the Provost Marshal's office at Fort Devens, Massachusetts when Pvt E-2 Thomas S. Price, RA 12 701 384 was interviewed by Daniel Bloomfield, Jr., a private investigator. At this time, Price stated that he was not certain that he had seen the Massachusetts State Police cruiser depart from the position at which it had been stopped by State Police officer Myles *Heffernon* when he apprehended Travis K. Stone, in whose vehicle Price was a passenger. Price further stated that during *Heffernon's* trial he had positively stated that he had seen the police cruiser leave the scene.

Jeffrey B. Wallace
CWO, U.S. Army

Subscribed and sworn to *bwfore* me

Emmanuel S. Perch
Notary Public
My commission expires
28 April 1967

AFFIDAVIT

January 12, 1965

I, Wayne C. Kruntorad, Sergeant First Class, United States Army, depose and say under oath that on or about the thirteenth of November, 1964, I was present when Pvt E-2 Thomas S. Price, RA 12 701 384, presently stationed at Fort Devens, Massachusetts, was interviewed by investigators from the Massachusetts State Police in the investigations section of the Provost Marshal's office. During this interview, Price was asked by one of the investigators if he noticed the location of the State Police cruiser as he was hitch-hiking towards Fort Devens. To the best of my knowledge, Price stated that the police *crusier* had not moved from the position where Travis K. Stone had been stopped by the State Police officer. On the sixth of January, 1965, I was present in the investigations section of the Provost Marshal's office at Fort Devens when Daniel Bloomfield Jr., a private investigator, interviewed Price with respect to the testimony he had given during the trial of State Police officer Myles *Heffernon,* Price stating that he had testified that the police cruiser had moved from the location that it had been when Stone was stopped. At this time, Price told Bloomfield that he was now unsure as to whether the cruiser had moved or not.

WAYNE C. KRUNTORAD
SFC, U.S. Army

Subscribed and sworn to before me

EMMANUEL S. PERCH
NotRY Public
My commission expires
28 April 1967

AFFIDAVIT

January 13, 1965

Having been advised of my rights under Article 31 of the Uniform Code of Military Justice, I, Thomas M. Price, RA 19 800 620, Company C, 2d Battalion, 2d Infantry, United States Army, presently stationed at Fort Devens, Massachusetts, depose and say under oath that on the day that Travis K. Stone was apprehended on Route #2 by State Police officer Myles *Heffernon,* I was a passenger in Stone's vehicle, and that after Stone had climbed into the police cruiser, I crossed Route #2 and walked back towards Fort Devens approximately one quarter of a mile and hitchhiked a ride in a passing vehicle; and that some time *bewteen* the time I began walking back towards Fort Devens and the time that I was picked up by the passing vehicle, I turned and observed the police cruiser moving away from me, that is to say, in the opposite direction, and that although I couldn't see Stone in the cruiser, I didn't see him on the road, and although I couldn't tell if he was in his own car, I assume he was still in the cruiser since he didn't stop me. I recall telling a man named Bloomfield in the investigations section of the Provost Marshal's office at Fort Devens a short time ago that I was not certain if I had seen the police cruiser move. I am now certain, however, that I saw the police cruiser move, although I am unable to say how far it moved, and that my testimony given at the trial of Trooper *Heffernon* was correct. I don't recall saying to anyone prior to the trial that I had not seen the cruiser move.

THOMAS M. PRICE
Private First Class, U.S. Army

Subscribed and sworn to before me this date

JAMES E. THOMAS
1st Lieutenant, CE
Summary Court Officer

AFFIDAVIT

Now comes F. Lee Bailey, Esq., and, being first duly sworn, says and deposes as follows:

I reside at 55 St. Paul Street in Brookline, and have offices at 40 Court Street in Boston. I am admitted to the practice of law before the Supreme Judicial Court of Massachusetts. I have acted as defense co-counsel, with Robert A. Barton, Esq., in the above-captioned case since the defendant was indicted. I participated in the trial of January 4-5, 1965, and was present in Court during the testimony of all of the witnesses except the defendant himself. On January 4, 1965, during the afternoon session, I was present when the Commonwealth offered the testimony of one Thomas Price. I heard Price testify on direct examination that while he was trying to hitch a ride westbound on Route 2 in Acton on November 1, 1964, just after leaving the company of the defendant herein and one Travis K. Stone, Jr., he observed the State Police Cruiser operated by the defendant pull away from the side of the road. This testimony by Price was wholly unanticipated by me, since nothing arising in the investigation and preparation of this case had indicated that Price would claim such an observation. I conducted the cross-examination of Thomas Price.

On January 4, 1964, I was introduced to Major Robert A. Murgia, Massachusetts State Police. As a result of this introduction, I am able to recognize and identify the said Robert A. Murgia. I observed him to be sitting in the courtroom during the morning and afternoon sessions of the first day of trial. I observed Major Murgia to be present during the direct and cross-examination of Witness Thomas Price. Subsequent to the testimony of Price, I observed Major Murgia to take the stand and testify for the Commonwealth. He was cross-examined by me. He testified on cross-examination that it was he who had

caused the case of Trooper Heffernan to be sent to the Middlesex County Grand Jury, through the office of the District Attorney, despite a recommendation to the contrary by the officer assigned by the said Major Murgia to investigate and report on the alleged bribe, Lieutenant Hector J. Cote (see Exhibit 6). At no time did Major Murgia disclose to me that Thomas Price had stated in his presence on November 13, 1964, that he had not seen the cruiser move, on November 1, 1964, before Price had gotten his ride to Fort Devens.

On January 6, 1965, I spoke with Donald L. Conn, Esq., counsel for the Commonwealth in this case. I related to him the report given me by Investigator Daniel Bloomfield Jr. (see affidavit annexed) with respect to statements made by Price on that date, including Price's description of the conversation held between himself and Mr. Conn, in the presence of Stone, on January 4, 1965, before the commencement of the trial. Mr. Conn stated to me that Price's recollection was substantially accurate, and that Price's first response to Mr. Conn's question "Did you see the cruiser move?" was "I'm not sure," or words to that effect. I asked Mr. Conn whether Major Murgia had at any time reported to him, before or during the trial, that Price had made a statement inconsistent with his testimony on November 13, 1964. Mr. Conn told me that Major Murgia had not spoken to him in this regard.

Following instructions from the Court on January 8, 1965, that defense counsel obtain affidavits in support of the Offer of Proof submitted with the Motion for New Trial in this case, I spoke with Colonel Murphy of the State Police, requesting an opportunity to interview Major Murgia in order to obtain his affidavit. Colonel Murphy indicated that he would be guided in this matter by the wishes of the District Attorney. I then spoke with Mr.

Conn, and asked that he confer with Major Murgia, and determine whether Major Murgia would submit to an interview, in Mr. Conn's presence if necessary. Several days later Mr. Conn informed me, through co-counsel, that it was the decision of the District Attorney to leave the matter up to Major Murgia entirely, and not to participate in the taking of his affidavit. On January 20, 1965, I called the Department of Public Safety and spoke with Major Robert Murgia. I requested that he allow me to interview him for the purpose of obtaining his affidavit with respect to the testimony and pre-trial statements of Thomas Price. Major *murgia* refused to submit to such an interview, and stated that he would not give me an affidavit. Accordingly, counsel are unable to fully comply with the instructions of the Court with respect to the submission of affidavits, and this affidavit is submitted in explanation thereof. I have read the above statement, and it is true.

F. Lee Bailey

Suffolk, ss:

Then personally appeared before me the above-named F. Lee Bailey, and swore on oath that the within affidavit is true and correct to the best of his knowledge and recollection, on this 23rd day of January, 1965.

Robert A. Barton
Notary Public
My commission expires
April 7, 1966

Affidavit

Now comes Daniel Bloomfield, Jr. and, being first duly sworn, deposes and says as follows:

I am 39 years of age, reside at 22 Lee Street, Marblehead, Massachusetts, and am a private detective within the mean-

ing of M. G. L. 147, § 23, duly licensed by the Commonwealth of Massachusetts through the Department of Public Safety; I am the President and Director of Investigative Associates, a corporation duly licensed by the Commonwealth, whose principal business involves the preparation of civil and criminal cases for trial lawyers. I hold the rank of Major in the United States Army Reserve, active. I have eight years' investigative experience, and have held my present position since 1961. At the request of Attorneys F. Lee Bailey and Robert A. Barton, I conducted an investigation into the circumstances surrounding the encounter between State Police Trooper Myles F. Heffernan and Private E-2 Travis K. Stone, U.S. Army, on or about November 1, 1964, on Rte. #2 in Acton, Massachusetts. In the course of this investigation I had occasion to interview one Thomas Price, Private First Class, U.S. Army, an alleged witness in the case. I first met Price on December 18, 1964, at the office of the Provost Marshal, Fort Devens, Massachusetts. This interview was conducted in the presence of Capt. Robert A. Welsh, U.S. Army, who was acting as counsel for Stone. Price told me in substance that on November 1, 1964, he was riding as a passenger in a Ford sedan operated by Stone, in an easterly direction on Rte. #2, when in the vicinity of Acton, Massachusetts, Stone was stopped by Trooper Heffernan. Subsequently, Price left the company of Stone and Heffernan and crossed Rte. #2 to the westbound side for the purposes of hitchhiking back to Fort Devens. He was picked up by a passing motorist. He stated that when he got his ride, Stone's car and the cruiser were still parked by the side of the road, and that he next saw Stone back at Fort Devens later in the day.

On January 4, 1965, I was present in Middlesex Superior Court from the opening of the case of Commonwealth v.

Heffernan until the Court recessed at about 1:00 p.m. At this time, with Witness Stone still on the stand, Attorneys Bailey and Barton informed me that my testimony would not be necessary and I departed to another assignment on an unrelated case. I did not return to the trial again. When I spoke to Attorneys Bailey and Barton next about the case, a finding of guilty had been returned against Heffernan. During the course of discussion on the afternoon of January 5, after the trial, I learned for the first time that Price had testified positively that before he got his ride on November 1, 1964, he had seen the cruiser pull away from the side of the road. I then told Attorneys Bailey and Barton, and Trooper Heffernan, about Price's statement to me in this regard on December 18, 1964, which was contradictory to Price's testimony. I had not previously reported this statement to either Defense Attorney, simply because it had never been thought or suggested, so as far as I was concerned, that Price had seen the cruiser move.

As a result of a conference held on January 5, 1965, I went on January 6, 1965 to the Middlesex Superior Court and picked up a photostat of Exhibit #6 (Report of Lt. Hector J. Cote to Capt. Robert A. Murgia) which I had never seen before. I then went to Fort Devens, and spoke with Sergeant First Class Wayne C. Kruntorad, Provost Marshal's Office. Sergeant Kruntorad stated that he had been present on November 13, 1964, when Private Price was interviewed by two State Police Officers investigating this matter. Examination of Exhibit #6 disclosed that these were Lt. Cote and Capt. Murgia. Sergeant Kruntorad stated that at that time Price had stated unequivocally that he had not seen Heffernan's cruiser move at all. Thereafter, Price was called in. He was asked if he had testified at trial that the cruiser had moved, and said that

he had. He was asked why he had changed his story as against the one he told on November 13, 1964, in the presence of Sergeant Kruntorad.

Price then stated that on January 4, 1965, before the commencement of the trial, he had spoken briefly with Assistant District Attorney Donald L. Conn in a hallway in the Middlesex Superior Court. He was asked by Mr. Conn whether or not he had seen the cruiser move, and had replied that he was not sure whether it had moved or not. Stone then interjected that Price ought not to be uncertain, and that he would have to leave it one way or the other, in positive fashion. Mr. Conn asked Price to search his memory for his best recollection. Price then stated that he had seen the cruiser move, and had testified accordingly.

Price was then asked whether his testimony had been accurate, and stated that it had not, because he was still uncertain as to what he had seen with respect to movement of the cruiser. Present at this time, in addition to this affiant and Sergeant Kruntorad, was Chief Warrant Officer Jeffrey B. Wallace, Provost Marshal's Office.

On January 12, 1965, at the direction of defense counsel, I returned to Fort Devens to obtain affidavits from Kruntorad, Wallace, and Price. Price was unavailable on this date, and I returned the following day. At this time, he was hostile, and said that if called back to Court, he would testify as he did at trial, that the cruiser had definitely moved. I asked him why he had once again changed his position on the matter. Price stated that the mother of one of his friends had mailed him a newspaper clipping wherein a representative of the defendant had been quoted as saying that Price had not told the complete truth at trial, and that he (Price) was very upset about this claim and therefore wished to adhere to his trial testimony. I took Price's affidavit, as well as affidavits from Sergeant

Kruntorad and CWO Wallace. I submitted each of these to defense counsel.

DANIEL BLOOMFIELD, JR.

SUFFOLK, ss January 26, 1965

Then personally appeared before me the within-named Daniel Bloomfield, Jr., and being by me first duly sworn, swore on oath that the within statements are true and correct as he verily believes.

TANYA R. PLANT
Notary Public
My Commission Expires:
September 17, 1971

Filed Jan. 26, 1965

On the ninth day of February, A. D., 1965, the defendant filed "Motion to Amend and Supplement Defendant's Motion for New Trial", which is as follows:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss SUPERIOR COURT
CRIMINAL
No. 71535

COMMONWEALTH
VS.
MYLES F. HEFFERNAN

MOTION TO AMEND AND SUPPLEMENT DEFENDANT'S MOTION FOR NEW TRIAL

Now comes the defendant in the above-entitled case and moves that he be permitted to amend his motion for a new trial, previously filed, by adding the following as a ground therefor:

(5) Because of newly discovered evidence

Defendant further moves that he be allowed to supplement the affidavits previously filed, by the submission of

the following affidavits, each of which was taken on Monday, February 8, 1965, at the office of the Provost Marshal, Fort Devens, Massachusetts, by Daniel Bloomfield, Jr., Defense Investigator:

(a) Affidavit of Thomas R. Kiernan
(b) Affidavit of John E. Lloyd, Jr.
(c) Affidavit of James H. Snow
(d) Affidavit of Junior L. Hensley
(e) Affidavit of David F. Hart
(f) Affidavit of Minos E. Paris

The defendant further moves that the Court hold a hearing to inquire into the truth of the statements attributed to Witness Stone, and into the existence of a conspiracy to commit perjury between Witnesses Stone and Price, and that the Court thereafter set aside the judgment of guilty and order a new trial.

By his attorneys,
F. Lee Bailey
Robert A. Barton

Affidavit

February 8, 1965

I, Thomas R. Kiernan, Sergeant, United States Army, RA11377242, having been first duly sworn, depose and say as follows:

On January 5, 1965, I was in the presence of Travis K. Stone and Sergeant James Snow, Charge of Quarters for my unit, Company B, 1st Battalion, Second Infantry, Fort Devens, Massachusetts when Snow asked Stone what happened at the trial of State Police Officer Myles *Heffernon,* and Stone replied, "I hung him by the balls." I am the leader of the 1st squad, 2d platoon to which Stone is assigned. I have had Stone in my squad since the first week or so in October, and have found him to be untrustworthy

in the things he says. His reputation in the company among his non-commissioned officers for telling the truth is not good. When he made the remark that he did to Sergeant Snow, he was acting very cocky and boastful. Stone has caused a lot of trouble in the outfit and is extremely immature in my opinion. I would never take Stone's word for what it was, knowing him as I do. He is the kind of man you have to double-check on if he tells you something.

THOMAS R. KIERNAN

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT,
Notary Public
My commission expires:
May 15, 1965

AFFIDAVIT

February 8, 1965

I, John E. Lloyd Jr, Specialist Fourth Class, Army of the United States, US52538517, having been first duly sworn, depose and say as follows:

On January 5, 1965, I was in the squad room when Travis K. Stone, another member of my unit, Company B, 1st Battalion, 2d Infantry, Fort Devens, Massachusetts, returned from testifying at the trial of State Police Officer Myles *Heffernon*. Someone there asked him, Specialist Fourth Hensley—and I think I asked him also—how it went, and he replied, "I screwed him, and I'd do it again if I had the chance." Then he began to laugh and joke about it. He made me mad acting like this, making a joke out of the whole thing, and I walked out of the room. I

recall that on November 1st, the day after payday, Stone came up to me and wanted to borrow some money from me, saying that he was broke. This occurred sometime in the morning, but I don't recall the exact time. I refused to lend him any money. His reputation for honesty and telling the truth among the rest of the members of the company is not good. He is known to lie about most everything.

JOHN E. LLOYD, JR.

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires
May 15, 1965

AFFIDAVIT

February 8, 1965

I, James H Snow, Sergeant, United States Army, RA-17476380, having been first duly sworn, *sear* and affirm that the following statements are true and correct to the best of my recollection:

On January 5, 1965, I was assigned as Charge of Quarters for my unit, Company /B/, 1st Battalion, 2d Infantry, Fort Devens, Massachusetts. When Travis K. Stone, a member of my unit, returned to his barracks from testifying at the trial of State Police Officer Myles Heffernan on this date, it was between 3:30 and 4:00 O'clock in the afternoon. I asked him what had happened, and he replied, "I hung him by the balls". It was very busy, and I had no further conversation with him. There was no doubt in my mind that Stone referred to Heffernan when he made

his above remark. Stone's attitude while making this statement to me was arrogant and boastfully proud. It was obvious to me that Stone was enjoying the notoriety as well as the fact that he was responsible for the conviction of Heffernan.

JAMES H. SNOW

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires:
May 15, 1965

AFFIDAVIT

FEBRUARY 8, 1965

I, Junior L. Hensley, Specialist Fourth Class, United States Army, RA13777405, having been first duly sworn, depose and say as follows:

On January 5, 1965, I was in the squad room when Travis K. Stone returned from giving his testimony at the trial of State Police Officer Myles *Heffernon.* I asked him how it went, and recall John Lloyd asking him the same question. Stone smiled and said, "I screwed him, and I'd do it again if I had the chance." Then he began laughing and joking about the whole thing. He made me sick. I told him, "You've messed up that man's career," and Stone said that he didn't care, and that since he was caught by this other cop, I might as well take the other one with me." We had been talking about the case which was in the newspapers, and I know that Stone referred to *Heffernon* as the one he was "going to take with him." The next morning just after I got back from chow, Sergeant Paris was

there and asked Stone what would happen if they found something wrong with his story. Stone said that if both stories—his and Price's—didn't go together, they'd figure there was something wrong, and he was going to see Price and see that it was straight.

JUNIOR L. HENSLEY

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires
May 15, 1965

AFFIDAVIT

February 8, 1965

I, David F. Hart, Sergeant, United States Army, RA-11344602, having been first duly sworn, depose and say as follows:

On January 5, 1965, I was in the presence of Travis K. Stone and Sergeant James Snow, charge of quarters for my unit, Company "B" 1st Battalion, Second Infantry, Fort Devens, Massachusetts when Snow *a* asked Stone what happened at the trial of State Police Officer Myles Heffernan, and Stone replied, "I hung him by the balls." I am the leader of the 1st Mortar Squad, Weapon's Platoon. I have known Stone since he was assigned to the company last October. His reputation for honesty is terrible, and he is known around the company as a liar. Because of his reputation in this respect, I would not trust him nor would I put any faith in anything he said.

DAVID F. HART

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires:
May 15, 1965

AFFIDAVIT

February 8, 1965

I, Minos E. Paris, Sergeant, United States Army, RA-52523535, having been first duly sworn, swear and affirm that the following statements are true and correct to the best of my recollection:

On January 5, 1965, I was in the presence of Travis K. Stone and Sergeant James Snow, Charge of Quarters on that day for our unit, Company B, 1st Battalion, Second Infantry, Fort Devens, Massachusetts. I am the leader of Alfa Fire Team, 1st squad, 2d platoon to which Stone is assigned. I heard Stone say, "I hung him by the balls," in answer to Sergeant Snow's question as to what happened at the trial of State Police Officer Myles *Heffernon.* The following morning, sometime between 6:00 and 6:30 a.m., I asked Stone, "What would happen if they found a flaw in your statement?" He said, "*Heffernon* didn't know enough shit. Me and Price got a good story, and we're gonna' stick by it." A few days later, I heard—I don't recall from what source—that they had found a flaw in Price's story. I asked Stone about this, and he said, "Oh, I'm not worried about that. I'm going up to talk to Price now. I gave my permission for him after getting authorization from the First Sergeant to do so. Stone was gone for approximately two hours."

MINOS E. PARIS

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires
May 15, 1965

Filed Feb. 9, 1965

On the fourth day of March, A. D., 1965, the Court, Bolster, J., filed "Statement of Case and Rulings On: Defendant's Motion for a New Trial, filed January 7, 1965; Defendant's Request for Rulings of Law, filed January 26, 1965; and Defendant's Motion to Amend and Supplement His Motion for New Trial, filed February 9, 1965," which is as follows:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CRIMINAL No. 71535

COMMONWEALTH OF MASSACHUSETTS

VS.

MYLES F. HEFFERNAN

STATEMENT OF CASE AND RULINGS ON: DEFENDANT'S MOTION FOR A NEW TRIAL FILED JANUARY 7, 1965; DEFENDANT'S REQUESTS FOR RULINGS OF LAW FILED JANUARY 26, 1965; AND DEFENDANT'S MOTION TO AMEND AND SUPPLEMENT HIS MOTION FOR NEW TRIAL FILED FEBRUARY 9, 1965.

This case came on for trial before me without a jury on January 4 and 5, 1965, the defendant having theretofore waived in writing his right to a trial by jury. I saw and heard all of the witnesses, including the defendant who

elected to testify; and on such evidence as I considered credible and reasonable inferences drawn therefrom, I found the defendant guilty of the offense charged.

On January 7, 1965, defendant filed his "motion for a new trial" (paper no. 7) together with his unsworn-to "offer of proof in support of his motion for new trial". (paper no. 8.) Defendant filed his "request for rulings of law" (paper no. 9) on January 26, 1965, together with five affidavits (paper no. 10) "to support (his) motion for new trial". On January 28, 1965, a hearing was held on defendant's said motion for a new trial. (See transcript January 28, 1965, pages 2 through 31.)

While a decision on said motion was under advisement, defendant, pursuant to leave, on February 9, 1965, filed his "motion to amend and supplement . . . (his) motion for new trial". (paper no. 11.) On February 11, 1965, I conferred with both counsel, and I then advised counsel for defendant that "regardless of the murder case then on trial (before me), I would give him a hearing during some late afternoon, if he wished . . ." (Transcript of hearing on February 25, 1965, page 2.)

A further hearing was held on February 25, 1965 on the said motion to amend and supplement (paper no. 11). After further consideration of all of the foregoing, the following rulings are now made:

A. Defendant's motion to amend and supplement (paper no. 11) is allowed solely for the purpose of thereby incorporating into the motion for a new trial (paper no. 7) the affidavits annexed to said motion to amend and supplement (paper no. 11). Insofar as defendant's said motion to amend and supplement (paper no. 11) "further moves that the (c)ourt hold a hearing to inquire into the truth of the statements attributed to (w)itness Stone, and into the existence of a conspiracy to commit perjury between (w)it-

nesses Stone and Price, and that the (c)ourt thereafter set aside the judgment of guilty and order a new trial", the same is denied.

B. Defendant's motion for a new trial (paper no. 7), as amended by the inclusion of the affidavits annexed to his motion to amend and supplement (paper no. 11) as evidence of "newly discovered evidence", is denied in toto.

C. With respect to defendant's request for rulings of law (paper no. 9), the court rules as follows:

1. Not given.
2. Not given.
3. Not given.
4. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
5. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
6. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
7. Not given because this request involves in part a finding of fact; and because, even if given, it would not affect the findings on which the ultimate finding of guilty was based.
8. Not given because this request is predicated on an assumption of fact, and because the principle of law here stated is not applicable to the facts found.
9. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.
10. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.
11. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the

judge's discretion and the principle is not controlling; therefore no ruling is required.

CHARLES S. BOLSTER
Justice of the Superior Court

March 3, 1965

Filed Mar. 4, 1965

On the tenth day of March, A. D., 1965, the defendant filed Claim of Exceptions to Denial of Motion for New Trial, Denial of Defendant's Request for Rulings of Law and Denial of Defendant's Motion to Amend and Supplement His Motion for New Trial", which is as follows:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT
CRIMINAL No. 71535

COMMONWEALTH
vs.
MYLES F. HEFFERNAN

CLAIM OF EXCEPTIONS TO DENIAL OF MOTION FOR NEW TRIAL, DENIAL OF DEFENDANT'S REQUESTS FOR RULINGS OF LAW, AND DENIAL OF DEFENDANT'S MOTION TO AMEND AND SUPPLEMENT HIS MOTION FOR NEW TRIAL

Now comes the Defendant and claims an exception to the denial of his motion for a new trial.

Now comes the Defendant and claims an exception to the denial of the Defendant's following requests for rulings of law: 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11.

Now comes the Defendant and claims an exception to the denial to the Defendant's motion to amend and supplement (paper #11) with respect to a hearing.

By his Attorneys,
F. LEE BAILEY
ROBERT A. BARTON

Filed Mar. 10, 1965

On the tenth day of March, A. D., 1965, the defendant filed "Claim of Appeal", which is as follows:

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT

CRIMINAL No. 71535

COMMONWEALTH OF MASSACHUSETTS

vs.

MYLES F. HEFFERNAN

CLAIM OF APPEAL

Now comes the defendant in the above-captioned case and, being *agrieved* by the rulings, judgments, orders and directions of the Court, and the denial of his motion for a new trial, claims an appeal.

By his attorneys,
ROBERT A. BARTON, ESQ.
F. LEE BAILEY, ESQ.

Filed Mar. 10, 1965

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT.

COMMONWEALTH

vs.

MYLES F. HEFFERNAN

No. 71535

DOCKET ENTRIES

Charge—Violation of Conduct of Public Official.

Atty. for Deft.:
F. Lee Bailey
40 Court Street
Boston, Mass.
Robert A. Barton
40 Court Street
Boston, Mass.

No. of Paper	Date of Entry	Docket Entries
1	1964, Dec. 9	Indictment.
	1964, Dec. 16	Defendant is arraigned and pleads Not Guilty. Defendant is ordered to personally recognize in the Sum of $100.00 and so recognizes in open Court.
	1964, Dec. 16	Continued to January 4, 1965.
2	1965, Jan. 4	Defendant's Waiver of Trial by Jury, filed in Court.
3	1965, Jan. 5	Finding of Bolster, J. GUILTY.
4	1965, Jan. 5	Reporting Evidence—Under the Provisions of General Laws (Ter. Ed.) Chapter 278, Section 33A to G inclusive, as amended the Superior Court appoints Donald O. Anderson Stenographer to take the Evidence. (Bolster, J.)
	1965, Jan. 5	COMMONWEALTH MOVES FOR SENTENCE.
	1965, Jan. 5	Defendant as principle and John Fleming as surety recognizes in $100.00 and on probation two years. By the Court, Bolster, J.
	1965, Jan. 5	Probation previously imposed on this day is this day revoked. SENTENCE: $100.00 Fine. Execution of the within Sentence is hereby Stayed until thirty days after receipt of rescript, or ninety days from this date,

			whichever is later. By the Court, Bolster, J.
5	1965, Jan.	6	Defendant's Claim of Appeal. Notice delivered to Judge Bolster and John J. Droney, District Attorney.
6	1965, Jan.	6	The defendant having filed a CLAIM OF APPEAL in the above entitled case, it is hereby ordered that Donald O. Anderson, Court Stenographer designated by the Court, prepare five copies of the "Transcript of Testimony under the provisions of Chapter 278, Sections 33A-33G of the General Laws. (Ter. Ed.)
7	1965, Jan.	7	Defendant's Motion for a New Trial.
	1965, Jan.	7	Notice delivered to District Attorney and Judge Bolster.
8	1965, Jan.	7	Defendant's offer of the proof in Support of his Motion for New Trial.
9	1965, Jan.	26	Defendant's Request for Rulings of Law.
10	1965, Jan.	26	Affidavit to Support Motion for New Trial.
11	1965, Feb.	9	Defendant's Motion to Amend and Supplement Defendant's Motion for New Trial.
12	1965, Mar.	4	Statement of Case and Rulings by Justice Bolster on: Defendant's Motion for New Trial filed January 7, 1965: Defendant's Re-

			quests for Rulings of Law filed January 26, 1965 and Defendant's Motion to Amend and Supplement his Motion for New Trial filed February 9, 1965.
	1965,	Mar. 4	Notice mailed to Attorney for the Defendant and District Attorney.
13	1965,	Mar. 10	Defendant's Claim of Exceptions to Denial of Motion for New Trial: Denial of Defendant's Requests for Rulings of Law and the Denial of Defendant's Motion to Amend and Supplement his Motion for New Trial. Notice delivered to District Attorney and Judge Bolster.
14	1965,	Mar. 10	Defendant's Claim of Appeal. Notice delivered to District Attorney and Judge Bolster.
15	1965	Mar. 15	Two sets of the "Transcript of the Evidence" delivered to the Clerk of Courts this day.
16	1965,	Mar. 15	Two sets of the "Transcript of the Evidence" (Informal Hearing on Motion for New Trial) delivered to the Clerk of Courts this day.
17	1965,	Mar. 15	Two sets of the "Transcript of the Evidence" (Motion for New Trial) delivered to the Clerk of Courts this day.
18	1965,	Mar. 15	Two sets of the "Transcript of the Evidence" (Hearing on Defendant's Motion to Amend and

		Supplement Defendant's Motion for New Trial) delivered to the Clerk of Courts this day.
19	1965, Apr. 14	Summary of the Record, written notice sent to Counsel of Record and District Attorney.
20	1965, Apr. 14	Certificate of Calvin A. Burger, Assistant Clerk of the Superior Court of the Completion of the Summary of the Record and notice sent to Counsel of Record and District Attorney.
21	1965, Apr. 26	Defendant's Motion to Extend Time for Filing Assignments of Error be extended to and including May 6, 1965.
22	1965, May 6	Defendant's Assignments of Error.

On the fourteenth day of April, A. D., 1965, written notice of the completion of the Summary of the Record and copies of the same were mailed to F. Lee Bailey, Esquire and Robert A. Barton, Esquire, Attorneys of record for the defendant Myles F. Heffernan, and delivered to John J. Droney, Esquire, District Attorney for the Northern District.

CALVIN A. BURGER
Assistant Clerk

Filed: 1965, April 14

CERTIFICATE OF NOTICE OF COMPLETION OF SUMMARY OF RECORD

I, Calvin A. Burger, Assistant Clerk of the Superior Court within and for the County of Middlesex, do hereby

certify that on April 14, 1965, I gave written notice of the completion of the Summary of the Record in the above entitled case by mailing said written notice, postage prepaid, to F. Lee Bailey, Esquire and Robert A. Barton, Esquire, 40 Court Street, Boston, Massachusetts, counsel of record for the defendant; and by delivering same to John J. Droney, Esquire, District Attorney for the Northern District.

CALVIN A. BURGER
Assistant Clerk

Filed April 14, 1965

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss

SUPERIOR COURT
CRIMINAL No. 71535

COMMONWEALTH

vs.

MYLES HEFFERNAN

DEFENDANT'S ASSIGNMENTS OF ERROR

Now comes the Defendant in the above-entitled case and assigns the following errors:

(NOTE: References to the several transcripts of the evidence at trial, and at post-trial proceedings, will be as follows:

Vol. I —pp. 1-237, Jan. 4-5, 1965
Vol. II —pp. 1-38, Jan. 4-8, 1965
Vol. III —pp. 1-31, Jan. 28, 1965
Vol. IV —pp. 1-22, Feb. 25, 1965)

Assignment No. 1:

The trial court erred in refusing to permit the Defendant to ask the principal prosecution witness, on cross-examination, if he had refused to testify, at a hearing in lower

court in the same case, to the same facts testified to by said witness on direct examination, by asserting his rights against self-incrimination. (Exception No. 1, Tr. 77).

Assignment No. 2:

The trial court erred in permitting the chief prosecution witness to testify that he had "conferred with" another prosecution witness shortly after the alleged offense, inasmuch as such fact could have only been admissible to infer a prior consistent statement, whereas a prior consistent statement, if offered directly, would have been inadmissible. (Exception No. 2, Tr. 100).

Assignment No. 3:

The trial court erred in ruling that because a prosecution witness had been questioned on cross-examination about certain statements made to him by a complainant, therefore all conversation held between himself and said complainant was rendered admissible on redirect examination. (Exception No. 3, Tr. 132)

Assignment No. 4:

The trial court erred in permitting the commonwealth to allege and argue that its complainant had made a prior consistent statement, as proof that said complainant had told the truth at trial. (Exception No. 5, Tr. 233).

Assignment No. 5:

The trial court erred in denying without hearing Defendant's motion to amend and supplement his motion for new trial, in which motion, with accompanying affidavits, there were sufficient allegations to, if proved, require that the judgment of conviction be set aside. (Exception to ruling "A" (R. 48) of the trial court's opinion as preserved (R. 51).)

Assignment No. 6:

The trial court erred in denying Defendant's motion for a new trial because the allegations of said motion, with accompanying affidavits thereto, were sufficient if proved to require that the judgment of conviction be set aside. (Exception to ruling "B" (R. 48) of the trial court's opinion as preserved (R. 51).)

Assignment No. 7:

The trial court erred in denying Defendant's request for ruling No. 1 (R. 21, see R. 48) that the testimony of the complainant in and of itself was insufficient to support a finding of guilty, as a matter of law. (Exception, R. 51).

Assignment No. 8:

The trial court erred in denying Defendant's request for ruling No. 2 (R. 21, see R. 48) that a finding of guilty based solely upon the testimony of the complainant would be against the weight of the evidence. (Exception, R. 51).

Assignment No. 9:

The trial court erred in denying Defendant's requests for ruling No. 3 (R. 21, see R. 48) by ruling that the suppression of evidence favorable to the Defendant would not violate Defendant's federal constitutional rights to a fair and impartial trial and thus require that the judgment of conviction be set aside. (Exception, R. 51).

Assignment No. 10:

The trial court erred in denying Defendant's requests for rulings Nos. 4, 5, and 6 (R. 22, see R. 48-49), thus ruling that a Major in the Massachusetts State Police who initiates and participates in a criminal prosecution has no duty of disclosure of evidence favoring the Defendant. (Exception, R. 51).

Assignment No. 11:

The trial court erred in denying Defendant's requests for rulings Nos. 7 and 8 (R. 22, see R. 49), thus ruling that a high-ranking police officer who initiates and then testifies for the prosecution of his inferior officer is entitled to withhold evidence tending to favor such inferior officer. (Exception, R. 51).

Assignment No. 12:

The trial court erred in denying Defendant's requests for rulings Nos. 9, 10, and 11 (R. 23, see R. 49), thus ruling that it did not have the power, in considering a motion for new trial, to broaden the rules of evidence and hear evidence indicating that Defendant had in the past taken great pains to avoid the very conduct charged in the bill of indictment, and embraced by the judgment of conviction. (Exception, R. 51).

By his Attorneys,

F. Lee Bailey

Robert A. Barton

Filed May 6, 1965

The foregoing are true copies.

Attest: .....Assistant Clerk.

Appendix B.

ADVANCE SHEETS

OPINIONS OF THE SUPREME JUDICIAL COURT

Published under authority of Chapter 402 of Acts of 1935

UNIVERSITY PRESS, 11 LEON STREET, BOSTON 15, MASS.

COMMONWEALTH *vs.* MYLES F. HEFFERNAN.

Middlesex. October 4, 1965. — January 4, 1966.

Present: SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

Evidence, Cross-examination, Judicial discretion, Redirect examination, Recent invention. *Practice, Criminal,* Argument by prosecutor, New trial, Suppression of evidence.

Indictment tried before *Bolster, J.*

REARDON, J. This is an appeal under G. L. c. 278, §§ 33A–33G, as amended, from the conviction of the defendant by a judge sitting without jury in the Superior Court. The defendant had been indicted under G. L. c. 268A, § 2 (d), in that he, being a State trooper, "did corruptly ask for and receive something of value for himself in return for being influenced in the performance of an official act."

It is undisputed that on the morning of November 1, 1964, while driving easterly on Route 2 in Concord, Travis K. Stone and Thomas M. Price, both army privates at Fort Devens, were stopped by the defendant and that Stone was the operator of the car. Although it had one registration plate attached, the car was in fact unregistered and uninsured. Stone was found by the defendant to be operating without an inspection sticker. Conversation ensued between Stone and the defendant, during which Price left and returned to Fort Devens by hitchhiking. There was con-

flicting testimony as to whether the police cruiser containing the defendant and Stone drove off prior to the departure of Price. It was testified by Stone and denied by the defendant that sometime later, in the cruiser, the defendant said to Stone, "If you would give me enough money to buy two fifths of Canadian Club Whiskey, I will let you go," and that Stone gave Heffernan $9 in response to this request. It is undisputed that Heffernan, at 8:30 A.M., made a radio transmission calling for a wrecker to tow the car which he termed "abandoned."

We turn to a consideration of the exceptions taken during trial and those relating to the denial of the defendant's amended motion for a new trial, including the denial of certain "requests for rulings of law." The defendant has assigned as error twelve matters.

1. The defendant complains of the judge's exclusion of a question which had reference to an appearance by Stone in the Concord District Court sometime prior to trial. The question was, "Did you refuse to testify [in that appearance] on the grounds that you might incriminate yourself?" The intention of defence counsel was to offer the evidence of a claim of the privilege against self-incrimination for the purpose of impeaching Stone's previous testimony that he had had a civic motive in informing certain police officials regarding the alleged bribe. There is no need to pass upon the defendant's contention based on the witness's privilege against self-incrimination. We hold the judge's ruling to be proper on the basis of his broad discretion to make rulings on the scope of cross-examination on collateral facts which reflect on credibility. *Commonwealth* v. *Sacket*, 22 Pick. 394, 396. *Commonwealth* v. *Patalano*, 254 Mass. 69, 72. *Commonwealth* v. *Makarewicz*, 333 Mass. 575, 593. *Commonwealth* v. *Palladino*, 346 Mass. 720, 723. Further, shortly after taking the exception, the defence counsel elicited testimony from Stone tending to show that he had claimed the privilege. *Commonwealth* v. *Corcoran*, 252 Mass. 465, 486. *Commonwealth* v. *Beal*, 314 Mass. 210, 229. *Commonwealth* v. *Makarewicz*, 333 Mass. 575, 593.

Commonwealth v. *Palladino,* 346 Mass. 720, 723.

2. During cross-examination of Stone he admitted that he had talked with a number of officers of the law about the case. He said that right after the alleged bribe he had "conversation" with a person who gave him a ride to his car and with the service station attendant where he left his car. Concerning these two, who were not officers, his answers did not imply that he had discussed the bribe with them. Defence counsel examined Stone's motive for not reporting the alleged bribe until he was arrested on a charge not related to this case, counsel's theory being that the bribe was an invention to discourage the Ayer police from prosecution of Stone on the charge against him. On redirect examination the Commonwealth attempted to dispel the implication that the story was an invention springing from the arrest. After the prosecution asked whether Stone had conferred with anyone about the alleged bribe on arriving at his barracks on the first of November, 1964, defence counsel objected. The judge permitted the answer, "Yes." The next question was, "And with whom did you confer?" Again defence counsel objected but the judge allowed the question. The defendant responded, "PFC Price and —." Defence counsel then interrupted with his exception, "Would you save my rights on this, your Honor?" The witness continued, "PFC Price and — well, almost everyone in the barracks heard about it sooner or later." Counsel said, "I object to that and move it be stricken." The judge replied, "That last may be stricken out."

The Commonwealth urged that defence counsel's two objections and his single tardy exception were not taken in a manner which would permit his challenging the questions or answers in this court. *Randall* v. *Peerless Motor Car Co.* 212 Mass. 352, 384. *Commonwealth* v. *Gray,* 314 Mass. 96, 102. G. L. c. 278, § 33B. Rule 72 of the Superior Court (1954). See *Commonwealth* v. *McGarty,* 323 Mass. 435, 439; *State* v. *Laundy,* 103 Ore. 443, 505–506.

Putting to one side the tardiness of the exception, we

note that the question and answer were both proper. "It is the general rule that a witness cannot be corroborated by showing that he has previously made statements similar to those given by him at the trial. . . . But there is an exception where it is claimed that the testimony is a recent invention or fabrication . . . ." *Walsh* v. *Wyman Lunch Co.* 244 Mass. 407, 409.

During the closing argument the prosecution adverted to the conversation between Stone and Price in the barracks concerning the alleged bribe. It was permissible, in the light of what we have already stated concerning this evidence, for the judge in making his findings to give such weight as he deemed warranted to the occurrence of this barracks conversation. *Damon* v. *Carrol,* 163 Mass. 404, 409. *Hubbard* v. *Allyn,* 200 Mass. 166, 171. *O'Kane* v. *Travelers Ins. Co.* 337 Mass. 182, 184. The prosecution's use of the statement in argument, analogizing it to "fresh complaint," was not improper argument since it was not "unfair, prejudicial and unwarranted." *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 28. See *Commonwealth* v. *Cabot,* 241 Mass. 131, 147–148.

3. We turn now to the problem of the denial of the defendant's amended motion for a new trial. The disposition of the motion as originally made hinged upon the affidavits of army personnel and of the defendant's own investigator. These affidavits were offered to prove that Price had stated on two occasions prior to the trial that he had never seen the police cruiser move. Price said at the trial that he had seen the cruiser move.

The defence argued that if Price's testimony were not credible (a) the conviction would be against the weight of the evidence, (b) there would be insufficient evidence to support the conviction, and (c) the action of a State police major, one Murgia, in failing to reveal the potentially impeaching fact of Price's deviation from his previous story was such a withholding of evidence that the conviction was as a matter of law vitiated under the Fourteenth Amendment of the Constitution of the United States, even though

there might be sufficient other evidence to support the conviction.

Subsequent to the motion and requests for rulings of law, the defendant filed the amendment to his motion, later incorporated into the motion by the trial judge. The affidavits supporting the amendment to the motion for a new trial were from six service men who gave testimony therein concerning obscene statements made by Stone following the conviction of the defendant and tending to indicate his pleasure at the result. It was argued that these affidavits were new evidence which, combined with the earlier ones, indicated that Stone harbored a malice toward the defendant which was his prime motive in reporting the bribe — that his motive was not inspired by a citizen's duty. The defendant also urged that the affidavits substantiated the existence of a conspiracy between Stone and Price to perjure themselves and harm the defendant.

We consider both sets of affidavits in the light of the well known rules concerning new evidence. *Davis* v. *Boston Elev. Ry.* 235 Mass. 482, 495–496. *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 24–25. *Commonwealth* v. *Devereaux,* 257 Mass. 391. *Commonwealth* v. *Sacco,* 259 Mass. 128, 136. The weight and import of the affidavits submitted in support of the defendant's motion were for the trial judge's discretion. *Commonwealth* v. *Crapo,* 212 Mass. 209, 210. *Sherman* v. *Collingwood,* 221 Mass. 9, 12–13. *Berggren* v. *Mutual Life Ins. Co.* 231 Mass. 173, 177–178.

The record sufficiently indicates the difficulty of the case which the trial judge had to decide but "it is not for us to determine what is to be believed. The question for us is: Could the judge conscientiously, intelligently and honestly have reached the result he has reached?" *Commonwealth* v. *Sacco,* 259 Mass. 128, 140, citing *Davis* v. *Boston Elev. Ry.* 235 Mass. 482, 502. While there were many witnesses who testified in the two days of trial, the defendant's guilt or innocence depended upon the value which the trial judge placed upon the testimony of the defendant as against that of the witness Stone, the only persons in a position to give

direct testimony on the subject matter of the indictment. The trial judge saw both of these men. He heard their stories. He was in the best position to ascertain the facts. A careful review of the evidence reveals no abuse of discretion in his refusing the new trial on the grounds that his finding was against the weight of the evidence, or that the evidence was insufficient to sustain the conviction.

It may further be stated that the judge is in his discretion entitled to choose the procedure by which he will consider a motion for a new trial. See *Opinion of the Justices*, 207 Mass. 606, 609; *Commonwealth* v. *Millen*, 290 Mass. 406, 410; *Graustein, petitioner*, 305 Mass. 571, 572; *Commonwealth* v. *Coggins*, 324 Mass. 552, 556–557; *Commonwealth* v. *Shand*, 335 Mass. 764. We are unable to say that the trial judge abused his discretion in not taking oral evidence on the questions of conspiracy to perjure even assuming that the witness Stone made the statements attributed to him. These could have been interpreted as expressions of Stone's great satisfaction in having helped convict the defendant as much as expressions showing that Stone had harbored a prior intent to convict him by any means.

4. The final question has to do with whether there was conduct by the prosecution which so vitiated the conviction as to require a new trial. The defendant contends that a State police major sat through significant testimony by Price which diverged from the story Price had previously told to him.

In his brief the defendant has cited cases concerning suppression of evidence by the prosecution. The leading case is *Mooney* v. *Holohan*, 294 U. S. 103, 110–113, wherein the Supreme Court of the United States said that the prosecuting attorney's knowing use of "perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony" would constitute a denial of due process of law. *Pyle* v. *Kansas*, 317 U. S. 213. *Alcorta* v. *Texas*, 355 U. S. 28. *Napue* v. *Illinois*, 360 U. S. 264. See *Brady* v. *Maryland*, 373 U. S. 83, 87–88; *Barbee* v. *Warden, Maryland Penitentiary*, 331 F. 2d 842 (4th Cir.).

We are not persuaded that we need consider the questions raised by *Mooney* v. *Holohan, supra.* Here the prosecutor had no knowledge of there being anything amounting to perjury or evidence suppression. Further, in the decisions cited above the perjury or suppression involved matters which could be held to have been material to the result reached below. Here we have the benefit of the trial judge's statement that Price's testimony played no part in the finding.

Moreover, there is a further consideration noted in *Green* v. *United States,* 158 F. Supp. 804, 809 (D. Mass.), affd. 256 F. 2d 483 (1st Cir.), in which it was said by Wyzanski, J., "where at his trial a defendant has knowledge that the prosecutor is knowingly using perjured testimony, and the defendant does not then raise the point, ordinarily he cannot have an adverse judgment set aside on the basis of that prior knowledge." *Price* v. *Johnston,* 334 U. S. 266, 277–278, 291. See *Taylor* v. *United States,* 229 F. 2d. 826, 833–834 (8th Cir.); *McDonald* v. *United States,* 282 F. 2d 737, 741 (9th Cir.).

The defendant has argued that Major Murgia was silent at the trial when he heard Price tell a story different in one respect from what Price had previously said to him. However, it does not appear that Murgia or any other member of the prosecution solicited any perjury or suppressed any facts. Rather, it appears that the facts which the defendant claims were suppressed were fully known to his own investigator. If the defendant was harmed it was because of a failure of communication between his investigator and his counsel. Such a failure of communication can in no way be laid to the activities or lack of them on the part of the State's officers. The defendant's full knowledge of the facts is for us the definitive answer to the defendant's claim of suppression of evidence and related use of perjured testimony.

The judge below thus did not err in refusing the defendant's motion for a new trial on the grounds of the prosecution's having suppressed evidence.

Following consideration of all the defendant's assignments of error we are satisfied that there was no error below.

Judgment affirmed.

F. Lee Bailey (*Robert A. Barton* with him) for the defendant.

Donald L. Conn, Assistant District Attorney (*Ruth I. Abrams*, Assistant District Attorney, with him), for the Commonwealth.

LIBRARY
SUPREME COURT, U. S.

Office-Supreme Court, U.S.
FILED
MAY 16 1966
JOHN F. DAVIS, CLERK

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1194.

MYLES F. HEFFERNAN,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION.

EDWARD W. BROOKE,
Attorney General,
WILLIE J. DAVIS,
Assistant Attorney General,
State House,
Boston, Massachusetts 02133

ALDEN G. MITCHELL & SON, INC., LAW PRINTERS, BOSTON.

Table of Contents.

Opinions below	1
Jurisdiction	1
Questions presented	1
Constitutional provisions and statutes involved	2
Statement of the case	2
Argument	3
I. There was no suppression of evidence by a prosecuting official	3
II. The refusal by the trial judge to hold an evidentiary hearing on the motion for new trial did not violate the petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States	4
Conclusion	5
Appendix	6

Table of Authorities Cited.

Cases.

Commonwealth v. Galvin, 323 Mass. 205	5
Commonwealth v. Millen, 290 Mass. 406	4
Commonwealth v. Sitko, 346 Mass. 765	4
Commonwealth v. Slaney, 345 Mass. 135	5
Commonwealth v. Rodriguez, 334 Mass. 703	5
Styria, The, v. Morgan, 186 U.S. 1	5

STATUTES, ETC.

U.S. Constitution, Fourteenth Amendment 1, 2, 4

28 U.S. Code, § 1254 (3) 1

Massachusetts General Laws, c. 268A, § 2 2

Supreme Court of the United States.

OCTOBER TERM, 1965.

No. 1194.

MYLES F. HEFFERNAN,
Petitioner,

v.

COMMONWEALTH OF MASSACHUSETTS.

BRIEF FOR RESPONDENT IN OPPOSITION.

Opinions Below.

The Opinion of the Supreme Judicial Court of Massachusetts (App. *infra*, p. 37) is reported at Massachusetts Advance Sheets (1966) pp. 1-8.

Jurisdiction.

The petitioner invokes the jurisdiction of this Court under 28 U.S. Code, § 1254 (3).

Questions Presented.

1. Was there suppression of evidence by a prosecuting official?

2. Did the refusal of the trial judge to hold an evidentiary hearing on the motion for new trial violate the petitioner's right to due process under the Fourteenth Amendment to the Constitution of the United States?

Constitutional Provisions and Statutes Involved.

CONSTITUTION OF THE UNITED STATES, AMENDMENT XIV.

SECTION 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges and immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

GENERAL LAWS OF MASSACHUSETTS, CHAPTER 268A, SECTION 2.

(*b*) Whoever, being a state, county or municipal employee or a member of the judiciary or a person selected to be such an employee or member of the judiciary, directly or indirectly, corruptly asks, demands, exacts, solicits, seeks, accepts, receives or agrees to receive anything of value for himself or for any other person or entity, in return for

(1) being influenced in his performance of any official act or any act within his official responsibility * * * shall be punished by a fine of not more than five thousand dollars or by imprisonment for not more than three years * * * [As inserted by St. 1962, c. 779, § 1.]

Statement of the Case.

On January 4, 1965, the petitioner was put to trial in the Superior Court for the County of Middlesex before Bolster, J., sitting without jury, on an indictment charging that he had asked for and received something of value in exchange for performing an official act (App. 33). On January 5, 1965, Judge Bolster found the petitioner guilty

and imposed a fine of $100 (App. 34). The petitioner appealed the conviction (App. 34) and also filed a motion for a new trial (App. 34). The petitioner alleged in his motion for a new trial that Major Robert D. Murgia, a prosecuting official, suppressed information that an important witness had substantially changed his story. The appeal of the conviction and the denial of the motion for new trial were argued before the Supreme Judicial Court on October 4, 1965, and decided on January 4, 1966 (App. 37).

Argument.

I. There was No Suppression of Evidence by a Prosecuting Official.

The petitioner alleges that Major Robert D. Murgia was present during the trial when Thomas M. Price gave testimony inconsistent with a story previously told to the investigating officer in his presence. To support this allegation the petitioner offers an affidavit by Sergeant First Class Wayne C. Kruntorad (App. 27). It must be noted that this is the only support offered for this allegation, and it is contradicted by the affidavit of the witness Price (App. 28).

The respondent expressly denies the allegation set forth by the petitioner; however, assuming it to be true, there was no violation of the petitioner's constitutional rights.

The petitioner alleges that Major Murgia was a prosecuting official, and therefore was under a duty to make known to the prosecutor the discrepancy in the testimony of the witness Thomas M. Price. Major Murgia was the petitioner's superior officer. In exercising his duty he ordered an investigation into the circumstances surrounding the case (App. 6). There is no indication that Major Murgia conducted the investigation.

Clearly, it cannot be said that Major Murgia was a prosecuting official because he happened to be the petitioner's superior officer. It is true that he testified at the trial as a Government witness (App. 6). However, his testimony merely related to his conversation with the petitioner, the report submitted to him by the petitioner, and his recommendations to his superior officer.

The petitioner has failed to show that the Commonwealth or any of its agents, knowingly or unknowingly, permitted the use of false testimony. Indeed, the affidavit of the witness Price (App. 28) shows that he is still consistent with his testimony at the trial.

In all of the cases cited by the petitioner the evidence suppressed was material to the main issues being tried. In the instant case we have the benefit of the trial judge's statement that Price's testimony played no part in the finding (App. 32, 43).

There is no evidence that the Commonwealth withheld, suppressed or concealed any facts or testimony which the petitioner was entitled to receive or have disclosed to him. The Commonwealth's conduct comported with all controlling constitutional and other standards and criteria of fairness, propriety, ethics and due process.

II. The Refusal by the Trial Judge to Hold an Evidentiary Hearing on the Motion for New Trial did Not Violate the Petitioner's Right to Due Process under the Fourteenth Amendment to the Constitution of the United States.

The petitioner has no right to insist that oral evidence be heard upon a motion. *Commonwealth* v. *Millen,* 290 Mass. 406, 410. It is the law of the Commonwealth that motions for new trial and hearings thereon are addressed to the discretion of the trial court. *Commonwealth* v. *Sitko,*

346 Mass. 765. *Commonwealth* v. *Slaney,* 345 Mass. 135, 142. *Commonwealth* v. *Rodriguez,* 334 Mass. 703, 704. *Commonwealth* v. *Galvin,* 323 Mass. 205, 220.

Discretion should not be exercised arbitrarily or wilfully, but with regard to what is right and equitable under the circumstances. See *The Styria* v. *Morgan,* 186 U.S. 1, 9. Indeed, the trial judge did not act arbitrarily in the instant case. He ruled that, "unless those affidavits indicate to me in my discretion the desirability of taking evidence, I shall not do so" (App. 17). Therefore the trial judge did not merely deny a hearing. He denied the hearing based upon the fact that the affidavits did not indicate that it would be desirable to take evidence.

The findings by the trial judge that the affidavits and allegations of the petitioner did not indicate the desirability of taking evidence were not an abuse of discretion.

The basis for the motion for new trial is the alleged suppression of information by a prosecuting official. Where the trial judge states that the evidence involved in this allegation was not controlling and would not have affected the result (App. 32), it cannot be said that the denial of an evidentiary hearing on the motion was an abuse of discretion. Indeed, under the circumstances such a hearing would have been a waste of time.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

EDWARD W. BROOKE,
Attorney General,
By WILLIE J. DAVIS,
Assistant Attorney General.

Appendix.

Testimony of Robert D. Murgia

Direct Examination by Mr. Conn:

Q. State your name, please? A. Robert D. Murgia.

Q. Your occupation? A. State police officer.

Q. Your rank, sir? A. Major.

Q. And with reference to the first part of November, 1964, as a result of conversations with subordinate officers in the state police, did you have occasion to order an investigation into the circumstances surrounding Trooper Myles Heffernan's activities on November 1, '64? A. Yes, sir, I did.

Q. And as a result of those investigations did you have occasion to personally confer with Trooper Myles Heffernan? A. Yes, sir, I did.

Q. And what was the date of your conversation with the trooper? A. It was—the date of my conversation with Trooper Myles Heffernan was Friday, November 13, 1964. I had accompanied Lt. Cote to the provost marshal's office earlier in the day, and I was present when Lt. Cote spoke with Private Travis Stone and Private First Class Price. Lt. Cote and myself returned to the Concord Barracks late in the afternoon. We remained at the Concord Barracks, at the state police barracks at Concord, approximately an hour or so, and Lt. Cote, Trooper Heffernan, and myself returned to the provost marshal's office in Fort Devens.

Q. Did you have conversation in the cruiser? A. Yes.

Q. Would you relate that, please? A. Upon departure from the provost marshal's office in Fort Devens, as Lt. Cote and myself were entering the car Trooper Heffernan turned to me and said "I want to apologize for embarrassing you and Lt. Cote." We departed from the premises of the federal reservation en route to the Concord Barracks. I had conversation with Trooper Heffernan again.

Q. What was that conversation, major? A. At this time I said to Trooper Heffernan, I said that "You are a consistent nonworker—

Mr. Bailey: I object to that. It is known to be improper by my brother, obviously prejudicial and irrelevant.

The Court: That may be stricken out. That has no bearing—

The Witness: I called to his attention the fact that—

Q. With reference—may I interrupt you here, major, since my brother is a little upset at the area of inquiry.

Mr. Bailey: I ask that that remark be stricken, too, your Honor.

The Court: It doesn't matter to me whether you are upset or not.

Mr. Bailey: I understand that, your Honor, but for the record I think it should be. This is deliberately prejudicial.

Q. Could we please confine ourselves, major, to the conversation relative to the 1st of November incident between the trooper and Private E-2 Stone? A. Well, at that time I said to Heffernan, I said, "You came across a legitimate arrest and you failed to take proper action."

Q. Did he respond? A. Yes, he did.

Q. What did he say? A. He said to me "Captain," he said, "I'm a hundred per cent wrong. I know I'm wrong. I'm a hundred per cent wrong." He reiterated that remark. When we arrived at the Concord barracks, which was approximately at 8 o'clock in the evening—it was still Friday, November 13, 1964. Prior to my departure from the barracks I ordered Trooper Heffernan to submit a full report in writing. I wanted the report to contain his complete activities concerning his conduct on Friday, November 13, 1964. I said to Trooper Heffernan, "I want that report on my desk at Framingham at 9 o'clock Monday morning, which was November 16th, 1964.

Q. All right. Now, major, whether or not when you arrived at work in Framingham on November 16, 1964, a report was on your desk submitted by Trooper Heffernan? A. Yes, sir, it was.

Q. And do you have in your possession that report? A. Yes, sir, I do.

Q. May I now see it, please?

Mr. Bailey: I understand this report relates to activities of Trooper Heffernan on November 13th?

Mr. Conn: November 1st, I believe.

The Witness: November 1st, yes.

Mr. Bailey: Your Honor, am I entitled to a voir dire on the admissibility of this? It is a two-page written statement in the form of a report, signed by the defendant and submitted under orders from a superior officer at a time when the defendant was under investigation for an alleged crime.

The Court: Well, I suppose the superior officer has a right to order an inferior personnel person to submit a report at just about any time, don't they?

Mr. Bailey: No, certainly not, your Honor, not when he is a prospective defendant in a criminal case.

The Court: If we argue the thing, we don't have to clear the courtroom. There's no jury here. This is the same as a voir dire.

Mr. Bailey: Yes. Just a couple of questions, if I may.

Cross Examination by Mr. Bailey:

Q. Captain, at the time you asked Heffernan for this report had you made decision as to whether or not to take action against him? A. No, sir, I had not.

Q. You had not? A. No, sir.

Q. So at this time you still had an open mind on the issue? A. I certainly did.

Q. And you had made no decision as to whether or not Heffernan should be prosecuted within or without the

department as a result of this? A. Not at that time, no, sir.

Mr. Bailey: All right. I will withdraw my objection, if that's the fact.

The Court: All right.

Mr. Conn: I offer this.

The Court: Any objection, Mr. Bailey?

Mr. Bailey: No. On the basis of the voir dire I withdraw my objection.

[Report of November 14, 1964, marked Exhibit No. 5.]

Direct Examination Continued by Mr. Conn:

Q. Was that signed? A. Yes, sir, that was signed.

The Court: You go ahead and I will catch up with the reading of this after 4 o'clock.

Mr. Conn: I have no further questions of the major.

Cross Examination by Mr. Bailey:

Q. Was it you who assigned Lt. Cote to this case? A. Yes, upon instructions from my superior officer, Thomas Murphy.

Q. But the report was made to you? A. Yes, sir.

Q. And did you receive a report from Lt. Cote? A. Yes, sir, I did.

Q. Are you able to identify Exhibit A for identification as the report submitted to you on November 16, 1964, by Lt. Cote? A. Yes, sir. That is a copy of his report to me.

Q. And did you assign him to this case for the purpose of getting the facts and his recommendations and conclusions? A. Yes, sir. I assigned him to that investigation on orders of my superior officer Col. Murphy. It is customary for the investigating officer to submit his recommendations also along with the report.

Q. Did you receive those recommendations? A. The recommendations that are in Lt. Cote's report, yes, sir, I did.

Q. Was it your decision to reject them? A. No, sir, it was not.

Q. It was some other person in the department? A. Yes, sir. I made my own report to Col. Murphy.

Q. I see. And did you concur in the recommendations with Lt. Cote? A. I concurred and I added some, sir.

Q. So, I take it, you recommended that this case not be prosecuted?

Mr. Conn: I pray your Honor's judgment.

The Witness: I recommended that this case be turned over to the District Attorney's Office. I was instructed to draw up charges and specifications for a departmental court marshal trial, which I did. I submitted those charges and specifications along with my report to Col. Murphy.

Q. But you did overrule the recommendation of Lt. Cote, who made the investigation, that the matter not be prosecuted because of discrepancies in the complainant's statement? A. I overruled him in part.

Mr. Bailey: Thank you.

Mr. Conn: In view of my brother's last statement as to this, it becomes apparent that a memorandum of law is a will-o-the-wisp, in view of what—

The Court: In any event, when I'm sitting without jury and something isn't admissible, it strikes me, Mr. Bailey, as a little unusual to suggest in this trial—if a judge looks at something that is clearly inadmissible, he's not presumed to be able to put it out of his mind.

Mr. Bailey: I understand that. The point is that I have read the memorandum and—

The Court: I am the one that's in the difficult position.

Mr. Conn: I would like to offer it now in evidence, your Honor, in view of the statement—

The Court: I'm not paying any attention to this mistrial business, but I may consider this further bit of evidence as to its admissibility. It is close to 4 o'clock, and I can pass on it at 10 o'clock tomorrow morning. I have serious doubt. There's no point in doing something that will require a second trial. A quick look at the books will save that possibility. I'm not going to look at it tonight. I'm going to wait and see whether or not it's admissible. If admissibility depends on contents, I will look at it fast and maybe admit part and exclude part. I think both of you are stuck with that.

Mr. Bailey: Thank you.

Mr. Conn: Thank you, your Honor.

Mr. Bailey: No further questions.

Mr. Conn: Thank you, major. You may step down.

[Witness excused.]

Mr. Conn: Your Honor, that would conclude the Commonwealth's case, and the Commonwealth rests.

The Court: Except for the ruling on admissibility of the report.

Mr. Barton: We will waive an opening, your Honor.

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, SS. SUPERIOR COURT

CRIMINAL I

COMMONWEALTH

VS.

MYLES F. HEFFERNAN

Motion for a New Trial.

Now comes the defendant in the above-entitled case and moves that the finding of guilty be vacated, or, in the alter-

native, that a new trial be granted, on the following grounds:

(1) There was not sufficient evidence to sustain the charge framed in the indictment presented by the state, the defendant, or both.

(2) The finding of the Court was against the weight of the evidence.

(3) The finding of the Court was predicated upon evidence which would have been seriously impeached were it not for the suppression of certainly highly relevant evidence by one who was a party to the prosecution.

(4) Justice has not been done and cannot be done upon the judgment of conviction now entered against the defendant.

WHEREFORE, the defendant respectfully requests that this Honorable Court:

(a) Hold a hearing and receive evidence therein, to determine whether or not the within allegations are true;

(b) Vacate the finding of guilty, and substitute therefor a finding of "Not Guilty"; or,

(c) Grant a motion for a new trial.

By his attorneys,

F. LEE BAILEY

Filed Jan. 7, 1965 ROBERT A. BARTON

Transcript of Informal Hearing on January 8, 1964, Relative to Motion for New Trial.

The Court: I wish at this point, just to bring the record up to date, to make a statement: On the day before yesterday—Wednesday January 6th—when I arrived at the Boston Courthouse, shortly before 4 o'clock, I was met by Mr. Bailey and Mr. Barton, counsel for the defend-

ant, who expressed a wish to see me on an important matter.

I went into conference with them. Mr. Bailey stated, as I remember it, that he had recently discovered some evidence that was of importance in this case. I asked him if he had informed Mr. Conn about it. He said he had tried to reach Mr. Conn and had been unable to do so. I suggested to Mr. Bailey—and I think he agreed with me—that any matter involving newly discovered evidence would properly be raised on a motion for a new trial or some other sort of motion which would raise it appropriately. And at that time it was left that he would get in touch with Mr. Conn and would, if he saw fit, prepare a motion as suggested.

Now, is there anything more of importance that transpired except that, Mr. Bailey?

Mr. Bailey: Yes, your Honor. For the record, I believe that when we approached your Honor in the Judges' Lobby in Suffolk it was for the purpose, as I recall, of asking that an early hearing be held on this new matter, but the text of the matter was not discussed. Your Honor was not informed as to what evidence we intended to present. This was within a few minutes of the time I learned what the evidence was.

Late that same day I did talk to Mr. Conn and informed him in detail of exactly what was entailed, and yesterday late in the afternoon we filed this motion for new trial with an offer of proof in support of showing what we would present if the hearing were granted, and a copy was left with Mr. Conn, which I believe he duly received.

Mr. Conn: I did duly receive the copy and Mr. Bailey did communicate with me.

The Court: I think you said something about newly discovered evidence having something to do with Fort Devens, and I suggested that before we consider that fur-

ther that we would wait until we had Mr. Conn in attendance.

Mr. Bailey: Yes, your Honor, that is correct.

The Court: So that there's that part. Now, I have been presented with a motion for a new trial filed yesterday, January 7, together with an unsworn statement by counsel for the defendant, which I have read. Because no affidavits have been filed, which I am entitled to have, Mr. Bailey at the Wednesday conference, I believe, said that he hadn't had time to get an affidavit, and I suggested that he file some sort of statement such as has been filed for my preliminary view, so to speak, after Mr. Conn had seen a copy. So I do not regard this as a hearing on this new motion, although I am quite prepared to act with as much dispatch as may be necessary.

But, however, in order to simplify matters, Mr. Bailey, with respect to Ground 3 of your motion for a new trial, which is: The finding of the Court was predicated upon evidence which would have been seriously impeached were it not for the suppression of certainly highly relevant evidence by one who was a party to the prosecution.

I gather from your supporting statement that that party to the prosecution was Major Murgia.

Mr. Bailey: It was indeed.

The Court: And nobody else?

Mr. Bailey: That's right, your Honor.

The Court: Now, I also gather from your supporting statement that the evidence which would have been impeached except for the alleged suppression was that Price had stated both on November 13, 1964, and on December 18, 1964, that he never saw the cruiser move at all before he last saw it, and that on January 4th, 1965, prior to his testimony before me, he stated that he was not sure whether he had seen the cruiser move—"I think it did move"—and the quote is lifted from your statement.

Now, that is the sum and substance, is it?

Mr. Bailey: I think it is somewhat narrower than that, your Honor. The reference to Major Murgia relates only to November 13th. The major was described as a party to the prosecution because—

The Court: No. I was asking you, Mr. Bailey—

Mr. Bailey: I understand.

The Court: —if the alleged evidence which would have been impeached was the evidence of Price and only of Price, and the impeachment would consist of the fact that Price allegedly testified on those two dates I mentioned—that he never saw the cruiser move at all before he last saw it, and that he stated here in the courthouse, prior to his testimony, that he was not sure whether he had seen the cruiser move—"I think it did move."

Mr. Bailey: The suppression relates only to the statement made on November 13th, but not to what was said in the courthouse. We do not contend that Mr. Conn expressed anything and—

The Court: I understand. I'm sure he didn't.

Mr. Bailey: —our contention is this: A man that was familiar with the case, conducted the investigation, sat in the courtroom during testimony, testified himself. We contend he had a duty to disclose a statement flatly contradicting testimony Price gave, which was the only evidence to impeach the defendant's testimony, other than the complainant himself, that Major Murgia knew it when he was standing here—that he should have at least told Mr. Conn about it and let him make the decision as to whether or not the defendant was entitled to that evidence, and that he did not, and if we were granted a hearing, I would show that Major Murgia did hear that statement, and it is conceivable that he didn't appreciate its significance at that time, and that because of his experience as a police officer, it is inconceivable that he

sat in the courtroom and heard Price, say, call Heffernan a liar, that he did not appreciate the significance of the change in position which Price had undergone as a percipient witness.

The Court: I think before I—well, yes, now, but this is the only evidence that you claim was suppressed. Is that it?

Mr. Bailey: The failure of the major to disclose the prior inconsistent statement. That is what I relate to and that alone—

The Court: Yes. All right.

Mr. Bailey: —under the circumstances.

The Court: Well, we have that narrowed down. Now, I think before I even hear the motion officially, so to speak, that I should be able to see a transcript of Price's testimony. I made notes but necessarily only notes and not verbatim notes, and therefore—the testimony wasn't long and we should be able to have a transcript before too long, I think, of that, or I should be able to.

Mr. Bailey: I thought of asking for that for this hearing but we did have a time limit.

The Court: Mr. Conn, I think you should have an opportunity to be heard. Bear in mind, gentlemen, this is not a formal hearing on this motion, because I wish before I even have a formal hearing, much less rule, I want to see a transcript of Price's testimony at the trial.

Mr. Conn: Your Honor, relative to the procedure at this point, of course, I would be perfectly in accord with your suggestion or statement that you'd like to see the transcript of Mr. Price's testimony, and I take it, your Honor, from your remarks that you do not want to hear from our office at this time relative to the merits of the motion that Mr. Bailey has filed.

I would like to make one point, however, your Honor, relative to a preliminary matter which might help the

Court and might speed the wheels of justice, so to speak—that I think that I would stipulate that Mr. Price did in fact testify he saw the cruiser move—

Mr. Bailey: Unequivocally.

Mr. Conn: —unequivocally. This is my recollection of the testimony—

The Court: I understand so, too.

Mr. Conn: It is my recollection and I think it's Mr. Bailey's and Mr. Barton's. This was the statement, and if this does in fact expedite, your Honor, what you have to consider in this hearing, a stipulation by the Commonwealth to that effect I'm sure it would be in order at this time.

The Court: Well, it might expedite the situation, but I don't like to expedite situations in a criminal case, even one with less seriousness than this, if by expedition the rights of either the defendant or Society are prejudiced.

Now, in addition, Mr. Bailey, I think I will, in the first instance, require such affidavits as you think are necessary to portray the situation before I act at all, and unless those affidavits indicate to me in my discretion the desirability of taking evidence, I shall not do so. So I suggest that you get whatever affidavits you think are necessary in this matter and file them at such time as you think you can do it conveniently.

I will try to see if I can set this down at some lull in the two murder cases that start next Monday. I could perhaps do it on Tuesday afternoon, because the plan of procedure, roughly, is to hope to have a jury empaneled by next Tuesday morning and then go on a view and get back, presumably, around 4 o'clock.

Mr. Conn: Late Tuesday afternoon, your Honor?

The Court: Tuesday at 4 or as soon thereafter as—

Mr. Conn: Your Honor, may I make one observation here?

The Court: Anybody can make any observations they wish.

Mr. Conn: Thank you, your Honor. I'm just thinking out loud, but it has occurred to me—you mentioned the possibility of testimony being taken. Procedurally, would it not perhaps eliminate the necessity of the taking of testimony if the District Attorney's Office was present and this was, in essence, a joint affidavit, whereby both Mr. Bailey, representing the defendant and myself representing the Office of the District Attorney could participate and be a part of the compiling of an affidavit? That would eliminate the necessity, I would think, of some future time requiring Price, if he is the key man, to come forward and take the stand and again testify under oath.

If we could take the affidavit in the nature of a deposition, your Honor, have a notary do it according to procedure, and have us both present and an opportunity to interrogate—procedurally, I just suggest this for what it is worth.

The Court: Let me make a counter-suggestion, Mr. Conn, and also Mr. Bailey and Mr. Barton: Anything that you two can work out to facilitate the matter would in this case be agreeable to me.

Mr. Bailey: I think, your Honor, Mr. Conn's suggestion is both expeditious and very fair. What occurs to me is this: We are appealing to about the broadest discretion your Honor can ever exercise, and Lord only knows what might influence that. Perhaps seeing the witnesses would have some bearing. It must have had some bearing on your findings at the trial.

Now, when you ask me to produce affidavits you raise this problem: In the first place, I would not expect your Honor to rule upon affidavits, so this is an interlocutory step principally to assure the Court that the evidence will be forthcoming. Second, I am dealing mostly with mili-

tary people. That is to say, Sgt. Druntorad and Sgt. Wallace of the CID and Thomas Price. I can furnish you Mr. Bloomfield's affidavit by simply having him notarize this offer of proof, because the information comes principally from him—he made the investigation. The offer of proof is intended to assure the Court that I, as counsel will present this evidence if you will hear it.

I would almost rather have you see the witnesses in flesh and blood and have Price stand up and tell you, your Honor, that he does not now know whether that car moved or not and is unable to say. As to what he told Mr. Conn, I have known Mr. Conn for a long time, and what he says as counsel in court without an affidavit is sufficient for me relative to his initial conversation with Price on the morning of the trial, the day it began, as to whether or not his initial response to the question was "I'm not sure," because I feel that this is critical. But we are in a bit of a fuzzy area, your Honor, and that is why I say I am appealing to your broad discretion.

It occurs to me—

Mr. Conn: Your Honor, may I make one observation—

The Court: Let me say this. I know you feel I have broad discretion, and I am trying to keep my discretion as broad as I should, and I think in this case we have to follow the rules, so we don't get into difficulties which don't in any way affect the merits of the situation. I think if we view the rule and the decided cases thereunder and have the affidavits first, then perhaps I can rule on those. Certainly I shouldn't expect a witness to go further than he does in an affidavit, and—

Mr. Bailey: Well, I don't know whether the military people, as a matter of policy, will give me affidavits, your Honor, without a long-chain-of-command problem. I know they have agreed to testify before your Honor, and I am confident that their testimony will fit the offer of proof.

The Court: Well, do you know, Mr. Conn, whether these allegations—I will call them—are based on Mr. Bloomfield's report to Mr. Bailey are correct?

Mr. Conn: Of my own knowledge, your Honor, I was not present when Mr. Bloomfield interrogated Price. I can only testify from my own knowledge relative to what occurred on January 4, 1965. I could testify to the effect that I did in fact have a conversation with the Witness Price. I could testify to the effect that in the course of the conversation Price, as I have indicated, I believe, was vague to a point, that Price was asked by me to "Please search your memory," and he did. And it was also told to me—and I will say unequivocally, and I think Mr. Bailey will agree—"All I want from you, Mr. Price, is the truth," and Price looked at me and said, in my company and in the company of Stone, "I think the car moved," and I believe those were his words.

Your Honor, I have one point that is bothering me about this procedure, and I have not mentioned it because of statements made from the bench by you and statements of my brother, Mr. Bailey. Our office has one position, your Honor, that I would respectfully request the Court to rule on, in view of the form of the motion.

It is my understanding, in this area, that we have to have something which is in the nature of newly discovered evidence to get this matter properly before the Court. I direct your attention to the attendant affidavit or statement, if you will, rather than call it an affidavit, filed by counsel for the defendant—

The Court: It's not an affidavit.

Mr. Conn: It's not an affidavit.

Mr. Bailey: It wasn't intended to be.

Mr. Conn: Right. —where it is indicated that this inconsistency was also brought forth on December 18, 1964, in the presence of Daniel Bloomfield, Jr., whom I think

Mr. Bailey will concede was a licensed investigator in the employ of counsel for the defendant.

This means, your Honor, that the discrepancy in the testimony of Price on the stand, as opposed to the statement made on December 18, which was the same as the statement made on November 13, was in fact in the possession of the defendant or his counsel, which, of course, is the same, and therefore, your Honor, from the particulars of the motion and the attendant statement filed with it I fail to see how the rule is complied with. I fail to see how there is in fact newly discovered evidence contained, and I would most strenuously urge to the Court that there is nothing showing apparent on the face of anything before the Court to even go into a hearing on it.

The Court: Well, that may or may not be so, Mr. Conn, but I think that in a criminal case before I rule even on that suggestion I should have the benefit of, one, a transcript of Price's testimony, and, two, such affidavits as Mr. Bailey and Mr. Barton can produce to enable me to look into them and see whether or not in my opinion there is any need for me to have a further hearing on the motion.

Mr. Conn: Your Honor, I only suggest this just for the purposes of the record. This, of course, I realize would have really, in essence, more properly be advanced when you say to myself, as representative of the Commonwealth, "Mr. Conn, I will hear argument," after hearing on whether or not this motion should be allowed. But it struck me it was also a little tainted with preliminary and I should advance it at this point.

The Court: I stated myself, Mr. Conn, that this is not a hearing on the motion.

Mr. Conn: Yes, your Honor, you did.

The Court: And one reason it's not a hearing on the motion is that I didn't set it down as such. Another

reason is that there is no affidavit here which would warrant a full hearing at this time, and there will be a hearing on the motion at such time as it is convenient for you gentlemen.

Mr. Conn: Certainly, your Honor.

The Court: Now, bearing in mind Mr. Bailey's suggestion that he may encounter a little delay—put it that way—in obtaining any affidavit he thinks necessary, why don't we leave it that when you gentlemen are ready I will make myself available at the first available opportunity, even if it's at 5 o'clock some afternoon or 7 o'clock some morning. I don't wish to delay a hearing where you requested some dispatch because of any personal inconvenience to me.

Mr. Bailey: I understood this correctly, I believe, to be a hearing on what would take place in a hearing on the merits, if such a hearing were held, and I think it's just that, and for that reason I filed before your Honor an offer of proof, as I thought I was supposed to do. But there are a couple of things that I should like to resolve, if I can, before we take the next step.

First, as I said, I am not going to ask Mr. Conn for an affidavit. The offer of proof recites that Price's first statement to him, which we got from Price, of course, was, "I'm not sure," and that Stone then chimed in. And I think Mr. Conn can tell us whether his recollection supports that or not.

Second, if the military persons, for reasons of policy, are unable to subscribe to affidavits without a long rigmarole, I shall submit, which is perhaps the best thing I can do, Mr. Bloomfield's affidavit saying what they told me.

I rather doubt that I am going to be able to get Price's affidavit, although I may well. I will try.

I think there's nothing in the motion saying we have newly discovered evidence as such, but, as your Honor

well knows, the statute allows several other grounds for the granting of a new trial, and these are alleged. If the evidence is not newly discovered, then the burden definitely is going to be upon counsel, as I shall show.

The third matter—it is my feeling, from past experience and from my understanding of the law in motions for a new trial, especially where this Court sat without jury and doesn't have to determine what a jury might have done but what the Court would have done, the rules should be relaxed to the extent that we should be allowed to show the inconceivability, as a matter of human fact, of this officer as saying "I want two fifths of Canadian Club." If it is demonstrated before your Honor that there are people who have offered this officer gratuities for strictly legal acts, which were kindnesses on his part, and were refused unequivocally because, "I don't take presents. It is against policy," well, I think then your Honor might have a little more difficulty in believing that he solicited such a bribe in this case.

The Court: Well, that relates to the statements in your—

Mr. Bailey: Yes, it does.

The Court: —offer of proof, which, as you say, embraces facts that are inadmissible in trial, and I don't see why I shouldn't treat that myself the same way I would if there had been a jury. I was the judge and the jury by selection, and I have to decide. When it comes to a question of sentence—I can let the rules of evidence go by the board. So far as the sentence went, I assume everybody was reasonably satisfied, but when it comes to a trial I don't think we vary, do we, the rules of evidence that normally apply in criminal cases? I shouldn't be disposed to do so unless you can point out some authority that says I should.

Mr. Bailey: Well, the authority I have, your Honor, is that you have a broad power to search the record to

determine whether or not justice has been done and consider extrinsic evidence. I know we are bound by formal rules. I don't agree with them all, but I don't think I can necessarily change them on an appeal, but where you are a consolidated operator as between the law and the facts here it seems to me if two minutes before this happened Heffernan turned down two jugs from an old lady for helping her across the street and then asked them from this kid, as alleged, your Honor would be quite correct in considering that.

This sentence was handed down with your finding, your Honor. This man is, by statute, destroyed. He is out, and I think that in view of that sentence and finding, as a practical matter, your Honor has the power, even though he may later reject the evidence, to hear anything we have to offer tending to show that it is unlikely the defendant would have done this.

The Court: I can say right now, Mr. Bailey, to save you further mental turmoil, that I am not under any circumstances—unless, as I say, you call my attention to some authority that I at the moment don't know of—I am not under any circumstances going to take evidence on that aspect. I think that would be—it would set a very bad precedent. So we will go ahead on the relatively narrow scope of this, which, as I understand, is now strictly limited to this question of whether or not Price saw the police cruiser move away from the scene before he lost sight of it and whatever he may have said in the past and at the trial on that particular point, which I understand is your point.

Mr. Bailey: It is, your Honor.

The Court: So limiting yourself to that point, you go ahead and get whatever you think I should look at by way of affidavit, and in the meantime Mr. Anderson will transcribe Mr. Price's testimony. He was not recalled, was he? It's all in one appearance?

Mr. Conn: All in one appearance, your Honor.

The Court: And I will look at those the minute they are available, and then have the clerk get in touch with you as to some convenient time for a formal hearing on this motion which has not yet been held.

Mr. Conn: May I ask respectfully if we may be furnished a copy of the testimony—the District Attorney's Office?

The Court: Oh, yes. You are going to have copies of it, anyway, for the appeal, so this is just writing that up ahead of the rest. You might as well make the five copies, Mr. Anderson.

So I guess that's all we can do this morning, unless you can think of something else, gentlemen.

Mr. Conn: Do you feel, your Honor—I hope I'm not covering ground that's already been covered, but do you feel you would prefer the procedural aspect of the taking of the affidavits, et cetera, to be worked out between the District Attorney's Office and counsel for the defendant?

The Court: I don't care, if you can work it out. If you can work out the history of Price's several versions, if there were several versions, and agree on them, so much the better. If you can't, why I will take the affidavits as presumably true and decide whether or not on those I see no basis for granting the motion or whether on those I see a basis in my discretion for requesting testimony.

Mr. Conn: Yes, your Honor. I think that states my position at the moment as clearly as I can do it.

The Court: If you have any question, let me know right now.

Mr. Bailey: All right, your Honor. Suppose we do this: Suppose we make a stipulation which is competent evidence—

The Court: Suppose what?

Mr. Bailey: We make a stipulation of fact, if we are able to do so.

The Court: Sure.

Mr. Bailey: It may be that Mr. Conn, having been furnished just this morning with a copy of my offer of proof, can, through his investigators, verify each allegation of fact in it, or most of them, and we can furnish you with a stipulation.

The Court: If he can, that can be a stipulation which I will accept, consider, and then decide whether or not I should change my mind.

Mr. Bailey: Very well, your Honor.

Mr. Conn: I think that is an excellent method of approach, your Honor. I will endeavor to use the facilities available to the District Attorney's Office to that end.

The Court: All right. You go ahead and act accordingly, and I will wait for word from you.

Mr. Conn: Yes, your Honor.

The Court: And in the meantime, so that the defendant's rights won't be prejudiced—sometimes there is a separate request for a hearing on a motion for a new trial, but since the motion itself requests a hearing to be held, I presume that that would cover the rule. So there won't be any need for a separate request for a hearing. Otherwise we will consider right now Mr. Bailey as making a request for a hearing on this motion.

Mr. Bailey: I do, your Honor.

The Court: Get that on the record.

Mr. Bailey: Very well, your Honor. Thank you.

The Court: And at any hearing, of course, we want the defendant here.

Mr. Bailey: The defendant will be present in court.

The Court: The defendant's offer of proof in support of his motion may be filed with the papers.

Mr. Bailey: Very well, your Honor.

The Court: I do not in any way consider this an affidavit.

Mr. Bailey: It wasn't intended to be.

The Court: I understand.

Mr. Bailey: Might I ask one other thing, your Honor? You made a tentative ruling on certain kinds of evidence I propose to offer which you wouldn't hear.

The Court: That's because of your statement to me that as far as admissible evidence goes, this is very important.

Mr. Bailey: Yes, I understand. I wonder if you might protect my rights on whether or not—since you have indicated there may be precious little precedent, whether or not your Honor would have the legal right to accept this and let it influence his judgment, I wonder if I might prepare a written offer of proof and have you exclude it or I can make it at the bench during the hearing.

The Court: You can file anything with me you want and I will look at it. How much attention I will pay to it is something that I will decide when the time comes.

Mr. Bailey: Very well.

Affidavit of Wayne C. Kruntorad.

January 12, 1965

I, Wayne C. Kruntorad, Sergeant First Class, United States Army, depose and say under oath that on or about the thirteenth of November, 1964, I was present when Pvt E-2 Thomas S. Price, RA 12 701 384, presently stationed at Fort Devens, Massachusetts, was interviewed by investigators from the Massachusetts State Police in the investigations section of the Provost Marshal's office. During this interview, Price was asked by one of the investigators if he noticed the location of the State Police cruiser as he was hitch-hiking towards Fort Devens. To the best

of my knowledge, Price stated that the police *crusier* had not moved from the position where Travis K. Stone had been stopped by the State Police officer. On the sixth of January, 1965, I was present in the investigations section of the Provost Marshal's office at Fort Devens when Daniel Bloomfield Jr., a private investigator, interviewed Price with respect to the testimony he had given during the trial of State Police officer Myles *Heffernon,* Price stating that he had testified that the police cruiser had moved from the location that it had been when Stone was stopped. At this time, Price told Bloomfield that he was now unsure as to whether the cruiser had moved or not.

WAYNE C. KRUNTORAD
SFC, U.S. Army

Subscribed and sworn to before me

EMMANUEL S. PERCH
NotRY Public
My commission expires
28 April 1967

Affidavit of Thomas M. Price.

January 13, 1965

Having been advised of my rights under Article 31 of the Uniform Code of Military Justice, I, Thomas M. Price, RA 19 800 620, Company C, 2d Battalion, 2d Infantry, United States Army, presently stationed at Fort Devens, Massachusetts, depose and say under oath that on the day that Travis K. Stone was apprehended on Route #2 by State Police officer Myles *Heffernon,* I was a passenger in Stone's vehicle, and that after Stone had climbed into the police cruiser, I crossed Route #2 and walked back towards Fort Devens approximately one quarter of a mile and hitch-

hiked a ride in a passing vehicle; and that some time *bewteen* the time I began walking back towards Fort Devens and the time that I was picked up by the passing vehicle, I turned and observed the police cruiser moving away from me, that is to say, in the opposite direction, and that although I couldn't see Stone in the cruiser, I didn't see him on the road, and although I couldn't tell if he was in his own car, I assume he was still in the cruiser since he didn't stop me. I recall telling a man named Bloomfield in the investigations section of the Provost Marshal's office at Fort Devens a short time ago that I was not certain if I had seen the police cruiser move. I am now certain, however, that I saw the police cruiser move, although I am unable to say how far it moved, and that my testimony given at the trial of Trooper *Heffernon* was correct. I don't recall saying to anyone prior to the trial that I had not seen the cruiser move.

THOMAS M. PRICE
Private First Class, U.S. Army

Subscribed and sworn to before me this date

JAMES E. THOMAS
1st Lieutenant, CE
Summary Court Officer

COMMONWEALTH OF MASSACHUSETTS
COUNTY OF MIDDLESEX

Subscribed and sworn to before me this 8th day of February 1965.

JEAN L. PRESCOTT
Notary Public
My commission expires
May 15, 1965

Filed Feb. 9, 1965

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT

CRIMINAL No. 71535

COMMONWEALTH OF MASSACHUSETTS

vs.

MYLES F. HEFFERNAN

Statement of Case and Rulings on: Defendant's Motion for a New Trial Filed January 7, 1965; Defendant's Requests for Rulings of Law Filed January 26, 1965; and Defendant's Motion to Amend and Supplement his Motion for New Trial Filed February 9, 1965.

This case came on for trial before me without a jury on January 4 and 5, 1965, the defendant having theretofore waived in writing his right to a trial by jury. I saw and heard all of the witnesses, including the defendant who elected to testify; and on such evidence as I considered credible and reasonable inferences drawn therefrom, I found the defendant guilty of the offense charged.

On January 7, 1965, defendant filed his "motion for a new trial" (paper no. 7) together with his unsworn-to "offer of proof in support of his motion for new trial". (paper no. 8.) Defendant filed his "request for rulings of law" (paper no. 9) on January 26, 1965, together with five affidavits (paper no. 10) "to support (his) motion for new trial". On January 28, 1965, a hearing was held on defendant's said motion for a new trial. (See transcript January 28, 1965, pages 2 through 31.)

While a decision on said motion was under advisement, defendant, pursuant to leave, on February 9, 1965, filed his "motion to amend and supplement . . . (his) motion for new trial". (paper no. 11.) On February 11, 1965, I conferred with both counsel, and I then advised counsel

for defendant that "regardless of the murder case then on trial (before me), I would give him a hearing during some late afternoon, if he wished . . ." (Transcript of hearing on February 25, 1965, page 2.)

A further hearing was held on February 25, 1965 on the said motion to amend and supplement (paper no. 11). After further consideration of all of the foregoing, the following rulings are now made:

A. Defendant's motion to amend and supplement (paper no. 11) is allowed solely for the purpose of thereby incorporating into the motion for a new trial (paper no. 7) the affidavits annexed to said motion to amend and supplement (paper no. 11). Insofar as defendant's said motion to amend and supplement (paper no. 11) "further moves that the (c)ourt hold a hearing to inquire into the truth of the statements attributed to (w)itness Stone, and into the existence of a conspiracy to commit perjury between (w)itnesses Stone and Price, and that the (c)ourt thereafter set aside the judgment of guilty and order a new trial", the same is denied.

B. Defendant's motion for a new trial (paper no. 7), as amended by the inclusion of the affidavits annexed to his motion to amend and supplement (paper no. 11) as evidence of "newly discovered evidence", is denied in toto.

C. With respect to defendant's request for rulings of law (paper no. 9), the court rules as follows:

1. Not given.
2. Not given.
3. Not given.
4. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
5. Even if this request states a correct principle of law, it is not given because it is not applicable to the facts found.
6. Even if this request states a correct principle of law,

it is not given because it is not applicable to the facts found.
7. Not given because this request involves in part a finding of fact; and because, even if given, it would not affect the findings on which the ultimate finding of guilty was based.
8. Not given because this request is predicated on an assumption of fact, and because the principle of law here stated is not applicable to the facts found.
9. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.
10. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.
11. Even if this request states a correct principle of law, the "power" referred to is to be exercised within the judge's discretion and the principle is not controlling; therefore no ruling is required.

CHARLES S. BOLSTER
Justice of the Superior Court

March 3, 1965

Filed Mar. 4, 1965

COMMONWEALTH OF MASSACHUSETTS

MIDDLESEX, ss. SUPERIOR COURT.

COMMONWEALTH

vs.

MYLES F. HEFFERNAN

No. 71535

Docket Entries.

Charge—Violation of Conduct of Public Official.

Atty. for Deft.:
F. Lee Bailey
40 Court Street
Boston, Mass.
Robert A. Barton
40 Court Street
Boston, Mass.

No. of Paper	Date of Entry	Docket Entries
1	1964, Dec. 9	Indictment.
	1964, Dec. 16	Defendant is arraigned and pleads Not Guilty. Defendant is ordered to personally recognize in the Sum of $100.00 and so recognizes in open Court.
	1964, Dec. 16	Continued to January 4, 1965.
2	1965, Jan. 4	Defendant's Waiver of Trial by Jury, filed in Court.
3	1965, Jan. 5	Finding of Bolster, J. GUILTY.
4	1965, Jan. 5	Reporting Evidence—Under the Provisions of General Laws (Ter. Ed.) Chapter 278, Section 33A to G inclusive, as amended the Superior Court appoints

			Donald O. Anderson Stenographer to take the Evidence. (Bolster, J.)
	1965, Jan.	5	COMMONWEALTH MOVES FOR SENTENCE.
	1965, Jan.	5	Defendant as principle and John Fleming as surety recognizes in $100.00 and on probation two years. By the Court, Bolster, J.
	1965, Jan.	5	Probation previously imposed on this day is this day revoked. SENTENCE: $100.00 Fine. Execution of the within Sentence is hereby Stayed until thirty days after receipt of rescript, or ninety days from this date, whichever is later. By the Court, Bolster, J.
5	1965, Jan.	6	Defendant's Claim of Appeal. Notice delivered to Judge Bolster and John J. Droney, District Attorney.
6	1965, Jan.	6	The defendant having filed a CLAIM OF APPEAL in the above entitled case, it is hereby ordered that Donald O. Anderson, Court Stenographer designated by the Court, prepare five copies of the "Transcript of Testimony under the provisions of Chapter 278, Sections 33A-33G of the General Laws. (Ter. Ed.)
7	1965, Jan.	7	Defendant's Motion for a New Trial.

	1965, Jan.	7	Notice delivered to District Attorney and Judge Bolster.
8	1965, Jan.	7	Defendant's offer of the proof in Support of his Motion for New Trial.
9	1965, Jan.	26	Defendant's Request for Rulings of Law.
10	1965, Jan.	26	Affidavit to Support Motion for New Trial.
11	1965, Feb.	9	Defendant's Motion to Amend and Supplement Defendant's Motion for New Trial.
12	1965, Mar.	4	Statement of Case and Rulings by Justice Bolster on: Defendant's Motion for New Trial filed January 7, 1965: Defendant's Requests for Rulings of Law filed January 26, 1965 and Defendant's Motion to Amend and Supplement his Motion for New Trial filed February 9, 1965.
	1965, Mar.	4	Notice mailed to Attorney for the Defendant and District Attorney.
13	1965, Mar.	10	Defendant's Claim of Exceptions to Denial of Motion for New Trial: Denial of Defendant's Requests for Rulings of Law and the Denial of Defendant's Motion to Amend and Supplement his Motion for New Trial.
			Notice delivered to District Attorney and Judge Bolster.
14	1965, Mar.	10	Defendant's Claim of Appeal.
			Notice delivered to District Attorney and Judge Bolster.

15	1965 Mar. 15	Two sets of the "Transcript of the Evidence" delivered to the Clerk of Courts this day.
16	1965, Mar. 15	Two sets of the "Transcript of the Evidence" (Informal Hearing on Motion for New Trial) delivered to the Clerk of Courts this day.
17	1965, Mar. 15	Two sets of the "Transcript of the Evidence" (Motion for New Trial) delivered to the Clerk of Courts this day.
18	1965, Mar. 15	Two sets of the "Transcript of the Evidence" (Hearing on Defendant's Motion to Amend and Supplement Defendant's Motion for New Trial) delivered to the Clerk of Courts this day.
19	1965, Apr. 14	Summary of the Record, written notice sent to Counsel of Record and District Attorney.
20	1965, Apr. 14	Certificate of Calvin A. Burger, Assistant Clerk of the Superior Court of the Completion of the Summary of the Record and notice sent to Counsel of Record and District Attorney.
21	1965, Apr. 26	Defendant's Motion to Extend Time for Filing Assignments of Error be extended to and including May 6, 1965.
22	1965, May 6	Defendant's Assignments of Error.

Opinion of the Supreme Judicial Court.

COMMONWEALTH *vs.* MYLES F. HEFFERNAN.

Middlesex. October 4, 1965.—January 4, 1966.

Present: SPALDING, WHITTEMORE, CUTTER, KIRK, SPIEGEL, & REARDON, JJ.

REARDON, J. This is an appeal under G.L. c. 278, §§ 33A-33G, as amended, from the conviction of the defendant by a judge sitting without jury in the Superior Court. The defendant had been indicted under G.L. c. 268A, § 2 (d), in that he, being a State trooper, "did corruptly ask for and receive something of value for himself in return for being influenced in the performance of an official act."

It is undisputed that on the morning of November 1, 1964, while driving easterly on Route 2 in Concord, Travis K. Stone and Thomas M. Price, both army privates at Fort Devens, were stopped by the defendant and that Stone was the operator of the car. Although it had one registration plate attached, the car was in fact unregistered and uninsured. Stone was found by the defendant to be operating without an inspection sticker. Conversation ensued between Stone and the defendant, during which Price left and returned to Fort Devens by hitchhiking. There was conflicting testimony as to whether the police cruiser containing the defendant and Stone drove off prior to the departure of Price. It was testified by Stone and denied by the defendant that sometime later, in the cruiser, the defendant said to Stone, "If you would give me enough money to buy two fifths of Canadian Club Whiskey, I will let you go," and that Stone gave Heffernan $9 in response to this request. It is undisputed that Heffernan, at 8:30 A.M., made a radio transmission calling for a wrecker to tow the car which he termed "abandoned."

We turn to a consideration of the exceptions taken during trial and those relating to the denial of the defendant's amended motion for a new trial, including the denial of certain "requests for rulings of law." The defendant has assigned as error twelve matters.

1. The defendant complains of the judge's exclusion of a question which had reference to an appearance by Stone in the Concord District Court sometime prior to trial. The question was, "Did you refuse to testify [in that appearance] on the grounds that you might incriminate yourself?" The intention of defence counsel was to offer the evidence of a claim of the privilege against self-incrimination for the purpose of impeaching Stone's previous testimony that he had had a civic motive in informing certain police officials regarding the alleged bribe. There is no need to pass upon the defendant's contention based on the witness's privilege against self-incrimination. We hold the judge's ruling to be proper on the basis of his broad discretion to make rulings on the scope of cross-examination on collateral facts which reflect on credibility. *Commonwealth* v. *Sacket,* 22 Pick. 394, 396. *Commonwealth* v. *Patalano,* 254 Mass. 69, 72. *Commonwealth* v. *Makarewicz,* 333 Mass. 575, 593. *Commonwealth* v. *Palladino,* 346 Mass. 720, 723. Further, shortly after taking the exception, the defence counsel elicited testimony from Stone tending to show that he had claimed the privilege. *Commonwealth* v. *Corcoran,* 252 Mass. 465, 486. *Commonwealth* v. *Beal,* 314 Mass. 210, 229. *Commonwealth* v. *Makarewicz,* 333 Mass. 575, 593. *Commonwealth* v. *Palladino,* 346 Mass. 720, 723.

2. During cross-examination of Stone he admitted that he had talked with a number of officers of the law about the case. He said that right after the alleged bribe he had "conversation" with a person who gave him a ride to his car and with the service station attendant where

he left his car. Concerning these two, who were not officers, his answers did not imply that he had discussed the bribe with them. Defence counsel examined Stone's motive for not reporting the alleged bribe until he was arrested on a charge not related to this case, counsel's theory being that the bribe was an invention to discourage the Ayer police from prosecution of Stone on the charge against him. On redirect examination the Commonwealth attempted to dispel the implication that the story was an invention springing from the arrest. After the prosecution asked whether Stone had conferred with anyone about the alleged bribe on arriving at his barracks on the first of November, 1964, defence counsel objected. The judge permitted the answer, "Yes." The next question was, "And with whom did you confer?" Again defence counsel objected but the judge allowed the question. The defendant responded, "PFC Price and—." Defence counsel then interrupted with his exception, "Would you save my rights on this, your Honor?" The witness continued, "PFC Price and—well, almost everyone in the barracks heard about it sooner or later." Counsel said, "I object to that and move it be stricken." The judge replied, "That last may be stricken out."

The Commonwealth urged that defence counsel's two objections and his single tardy exception were not taken in a manner which would permit his challenging the questions or answers in this court. *Randall* v. *Peerless Motor Car Co.*, 212 Mass. 352, 384. *Commonwealth* v. *Gray*, 314 Mass. 96, 102. G.L. c. 278, § 33B. Rule 72 of the Superior Court (1954). See *Commonwealth* v. *McGarty*, 323 Mass. 435, 439; *State* v. *Laundy*, 103 Ore. 443, 505-506.

Putting to one side the tardiness of the exception, we note that the question and answer were both proper. "It is the general rule that a witness cannot be corroborated by showing that he has previously made statements simi-

lar to those given by him at the trial. . . . But there is an exception where it is claimed that the testimony is a recent invention or fabrication. . . ." *Walsh* v. *Wyman Lunch Co.* 244 Mass. 407, 409.

During the closing argument the prosecution adverted to the conversation between Stone and Price in the barracks concerning the alleged bribe. It was permissible, in the light of what we have already stated concerning this evidence, for the judge in making his findings to give such weight as he deemed warranted to the occurrence of this barracks conversation. *Damon* v. *Carrol,* 163 Mass. 404, 409. *Hubbard* v. *Allyn,* 200 Mass. 166, 171. *O'Kane* v. *Travelers Ins. Co.* 337 Mass. 182, 184. The prosecution's use of the statement in argument, analogizing it to "fresh complaint," was not improper argument since it was not "unfair, prejudicial and unwarranted." *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 28. See *Commonwealth* v. *Cabot,* 241 Mass. 131, 147-148.

3. We turn now to the problem of the denial of the defendant's amended motion for a new trial. The disposition of the motion as originally made hinged upon the affidavits of army personnel and of the defendant's own investigator. These affidavits were offered to prove that Price had stated on two occasions prior to the trial that he had never seen the police cruiser move. Price said at the trial that he had seen the cruiser move.

The defence argued that if Price's testimony were not credible (a) the conviction would be against the weight of the evidence, (b) there would be insufficient evidence to support the conviction, and (c) the action of a State police major, one Murgia, in failing to reveal the potentially impeaching fact of Price's deviation from his previous story was such a withholding of evidence that the conviction was as a matter of law vitiated under the Fourteenth Amendment of the Constitution of the United States, even

though there might be sufficient other evidence to support the conviction.

Subsequent to the motion and requests for rulings of law, the defendant filed the amendment to his motion, later incorporated into the motion by the trial judge. The affidavits supporting the amendment to the motion for a new trial were from six service men who gave testimony therein concerning obscene statements made by Stone following the conviction of the defendant and tending to indicate his pleasure at the result. It was argued that these affidavits were new evidence which, combined with the earlier ones, indicated that Stone harbored a malice toward the defendant which was his prime motive in reporting the bribe—that his motive was not inspired by a citizen's duty. The defendant also urged that the affidavits substantiated the existence of a conspiracy between Stone and Price to perjure themselves and harm the defendant.

We consider both sets of affidavits in the light of the well known rules concerning new evidence. *Davis* v. *Boston Elev. Ry.* 235 Mass. 482, 495-496. *Commonwealth* v. *Dascalakis,* 246 Mass. 12, 24-25. *Commonwealth* v. *Devereaux,* 257 Mass. 391. *Commonwealth* v. *Sacco,* 259 Mass. 128, 136. The weight and import of the affidavits submitted in support of the defendant's motion were for the trial judge's discretion. *Commonwealth* v. *Crapo,* 212 Mass. 209, 210. *Sherman* v. *Collingwood,* 221 Mass. 9, 12-13. *Berggren* v. *Mutual Life Ins. Co.* 231 Mass. 173, 177-178.

The record sufficiently indicates the difficulty of the case which the trial judge had to decide but "it is not for us to determine what is to be believed. The question for us is: Could the judge conscientiously, intelligently and honestly have reached the result he has reached?" *Commonwealth* v. *Sacco,* 259 Mass. 128, 140, citing *Davis* v.

Boston Elev. Ry. 235 Mass. 482, 502. While there were many witnesses who testified in the two days of trial, the defendant's guilt or innocence depended upon the value which the trial judge placed upon the testimony of the defendant as against that of the witness Stone, the only persons in a position to give direct testimony on the subject matter of the indictment. The trial judge saw both of these men. He heard their stories. He was in the best position to ascertain the facts. A careful review of the evidence reveals no abuse of discretion in his refusing the new trial on the grounds that his finding was against the weight of the evidence, or that the evidence was insufficient to sustain the conviction.

It may further be stated that the judge is in his discretion entitled to choose the procedure by which he will consider a motion for a new trial. See *Opinion of the Justices,* 207 Mass. 606, 609; *Commonwealth* v. *Millen,* 290 Mass. 406, 410; *Graustein, petitioner,* 305 Mass. 571, 572; *Commonwealth* v. *Coggins,* 324 Mass. 552, 556-557; *Commonwealth* v. *Shand,* 335 Mass. 764. We are unable to say that the trial judge abused his discretion in not taking oral evidence on the questions of conspiracy to perjure even assuming that the witness Stone made the statements attributed to him. These could have been interpreted as expressions of Stone's great satisfaction in having helped convict the defendant as much as expressions showing that Stone had harbored a prior intent to convict him by any means.

4. The final question has to do with whether there was conduct by the prosecution which so vitiated the conviction as to require a new trial. The defendant contends that a State police major sat through significant testimony by Price which diverged from the story Price had previously told to him.

In his brief the defendant has cited cases concerning suppression of evidence by the prosecution. The leading case

is *Mooney* v. *Holohan,* 294 U. S. 103, 110-113, wherein the Supreme Court of the United States said that the prosecuting attorney's knowing use of "perjured testimony to obtain the conviction and the deliberate suppression of evidence to impeach that testimony" would constitute a denial of due process of law. *Pyle* v. *Kansas,* 317 U. S. 213. *Alcorta* v. *Texas,* 355 U. S. 28. *Napue* v. *Illinois,* 360 U. S. 264. See *Brady* v. *Maryland,* 373 U. S. 83, 87-88; *Barbee* v. *Warden, Maryland Penitentiary,* 331 F. 2d 842 (4th Cir.).

We are not persuaded that we need consider the questions raised by *Mooney* v. *Holohan, supra.* Here the prosecutor had no knowledge of there being anything amounting to perjury or evidence suppression. Further, in the decisions cited above the perjury or suppression involved matters which could be held to have been material to the result reached below. Here we have the benefit of the trial judge's statement that Price's testimony played no part in the finding.

Moreover, there is a further consideration noted in *Green* v. *United States,* 158 F. Supp. 804, 809 (D. Mass.), affd. 256 F. 2d 483 (1st Cir.), in which it was said by Wyzanski, J., "where at his trial a defendant has knowledge that the prosecutor is knowingly using perjured testimony, and the defendant does not then raise the point, ordinarily he cannot have an adverse judgment set aside on the basis of that prior knowledge." *Price* v. *Johnston,* 334 U. S. 266, 277-278, 291. See *Taylor* v. *United States,* 229 F. 2d 826, 833-834 (8th Cir.); *McDonald* v. *United States,* 282 F. 2d 737, 741 (9th Cir.).

The defendant has argued that Major Murgia was silent at the trial when he heard Price tell a story different in one respect from what Price had previously said to him. However, it does not appear that Murgia or any other member of the prosecution solicited any perjury or suppressed any facts. Rather, it appears that the facts which the defend-

ant claims were suppressed were fully known to his own investigator. If the defendant was harmed it was because of a failure of communication between his investigator and his counsel. Such a failure of communication can in no way be laid to the activities or lack of them on the part of the State's offcers. The defendant's full knowledge of the facts is for us the definitive answer to the defendant's claim of suppression of evidence and related use of perjured testimony.

The judge below thus did not err in refusing the defendant's motion for a new trial on the grounds of the prosecution's having suppressed evidence.

Following consideration of all the defendant's assignments of error we are satisfied that there was no error below.

Judgment affirmed.

F. Lee Bailey (*Robert A. Barton* with him) for the defendant.

Donald L. Conn, Assistant District Attorney (*Ruth I. Abrams,* Assistant District Attorney, with him), for the Commonwealth.